CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 429

D. GINSBERG & SONS, INC., PETITIONER,

vs.

JOSEPH POPKIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 1, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,243)

(36,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 429

D. GINSBERG & SONS, INC., PETITIONER,

vs.

JOSEPH POPKIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, Southern New York	1	1
Order to show cause	1	1
Petition of Joseph Popkin submited in support of order to show cause	3	2
Ancillary order of examination and order of ne exeat	7	4
Petition of D. Ginsberg & Sons, Inc., submitted on application for order	9	5
Writ ne exeat	15	8
Order by the district court for the eastern district of New York, allowing application in the southern district for ancillary process and order of ne exeat	18	10
Petition of D. Ginsberg & Sons, Inc., submitted in support of application made in the eastern district of New York for the issuance of ancillary process in the southern district	20	11
Writ ne exeat by the district court for the eastern district of New York	24	13
Petition of D. Ginsberg & Sons, Inc., submitted in support of application for a writ ne exeat made by the district court of the eastern district of New York	26	14

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1931

	Original	Print
Order of arrest made by the district court for the eastern district of New York	40	21
Petition of Leo J. Linder in support of application for an order of arrest made by the district court for the eastern district of New York	42	22
Affidavit of Nathaniel M. Satloff submitted in support of application for an order of arrest made by the district court for the eastern district of New York	52	27
Opinion, Woolsey, D. J.	56	29
Order appealed from	64	34
Assignment of errors	67	36
Stipulation re transcript of record	70	37
Clerk's certificate (omitted in printing)	71	
Order of United States Circuit court of appeals allowing appeal	72	38
Proceedings in United States circuit court of appeals, second circuit	73	38
Opinion, Manton, J.	73	38
Judgment	81	43
Clerk's certificate (omitted in printing)	82	
Order allowing certiorari	83	44

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

M13-320

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Joseph Popkin, duly verified the 8th day of December, 1930, upon the petition of D. Ginsberg & Sons, Inc., dated the 4th day of December, 1930, presented to this Court, and the ancillary order of Judge Goddard, granted thereon bearing date the 4th day of December, 1930, which said papers are now on file in the office of the Clerk of this Court, and upon all the proceedings heretofore had herein.

Let D. Ginsburg & Sons, Inc., or its attorney, Leo J. Linder, Esq., show cause before me at a stated term of this Court for the hearing of motions to be held at the Courthouse thereof in room 235 in the old Post Office Building, Park Row, in the Borough of Manhattan, City of New York, on the 10th day of December, 1930, at 10:30 in the forenoon of said day or as soon thereafter as counsel can be heard, why an order should not be made quashing, vacating, set-
[fol. 2] ting aside the ancillary order of ne exeat granted by Judge Goddard on the 4th day of December, 1930, under which Joseph Popkin was apprehended, and vacating and setting aside the provision of said order directing said Joseph Popkin to appear and be examined before Oscar W. Ehrhorn, Esq., as Special Commissioner, and for such other and further relief as to this Court may seem just and proper, and in the meantime, and until the hearing and determination of this motion, the said D. Ginsburg & Sons, Inc., and said Leo J. Linder, Esq., as its attorney, and the said Oscar W. Ehrhorn, Esq., as Special Commissioner, be and they hereby are stayed from further proceeding with the examination of said Joseph Popkin.

Sufficient reason appearing therefor, let service of a copy of this order and the papers upon which the same has

been granted, upon Leo J. Linder, Esq., attorney for said D. Ginsburg & Sons, Inc., on or before the ninth day of December, 1930, at 10:30 o'clock A. M., be deemed good and sufficient service.

Dated New York, December 8th, 1930.

Woolsey, United States District Judge.

[fol. 3] In United States District Court, Southern District of New York

[Title omitted]

Petition of Joseph Popkin, Submitted in Support of Order to Show Cause Made December 8, 1930

State of New York,
County of New York,
Southern District of New York, ss:

Joseph Popkin, being duly sworn, deposes and says:

That the Foster Construction Corporation, the bankrupt above named, was duly adjudicated a bankrupt in the United States District Court for the Eastern District of New York prior to the 1st day of July, 1930, and a trustee of said bankrupt was duly appointed and qualified about the 1st day of July, 1930, as your deponent has been informed and verily believes. That no ancillary receiver or trustee in bankruptcy has been appointed for said bankrupt in this District, and that there are no ancillary proceedings pend-
[fol. 4] ing in this District except the one hereinafter referred to.

That upon the petition of D. Ginsburg & Sons, Inc., verified the 4th day of December, 1930, an alleged creditor of the above named bankrupt, Judge Goddard, on the 4th day of December, 1930, granted an ancillary order for the examination of your deponent and issued an order of ne exeast therein under which your deponent was taken into custody by the United States Marshal of this District, and thereafter released upon furnishing a bond in the sum of $10,000.00 as in said order provided. That under the order of Judge Goddard aforesaid, your deponent was directed to appear before Oscar W. Ehrhorn, Esq., who was designated as Special Commissioner herein to be examined con-

cerning the acts, conduct, and property of the above named bankrupt. That your deponent appeared before said Special Commissioner on the 6th day of December, 1930, with his counsel, Louis Jersawit, Esq., and through his counsel asserted that the said Commissioner was without power to hear and proceed with the examination of your deponent as Judge Goddard was without power, authority or jurisdiction to make the aforesaid order of ne exeat, but was overruled by said Commissioner, and the further hearing adjourned until December 9th, 1930.

That as your deponent has been advised by his said counsel and verily believes, Judge Goddard was without power, authority or jurisdiction to make or grant the an- [fol. 5] cillary order of ne exeat aforesaid for the reason that the petition of D. Ginsburg & Sons, Inc., the alleged creditor of the above named bankrupt, was insufficient upon the face thereof to warrant the issuance of said order of ne exeat, or the order that your deponent appear for examination before such Special Commissioner.

That your petitioner makes the present application to quash, vacate, and set aside the said ancillary order of ne exeat herein and to vacate the order directing the examination of your deponent before said Special Commissioner, upon the papers upon which the same was granted, as it affirmatively appears therefrom that Judge Goddard was without power, authority or jurisdiction to grant said ancillary order of ne exeat.

That the said D. Ginsburg & Sons, Inc., was represented on the application for the said ancillary order of ne exeat aforesaid by Leo J. Linder, Esq., as its attorney, and upon whose motion the said order was granted.

Wherefore your deponent respectfully asks that an order be made directing said D. Ginsburg & Sons, Inc., or Leo. J. Linder, as its attorney to show cause why an order should not be made quashing, vacating and setting aside the said ancillary order of ne exeat granted by Judge Goddard on the 4th day of December, 1930, and vacating the order for the examination before the Special Commissioner, and for [fol. 6] such other and further relief as may be just and proper in the premises. That the reason an order to show cause is asked for instead of giving the usual notice of motion is that this motion cannot be heard before the adjourned day of the hearing before the said Special Com-

missioner, and that your deponent desires a stay of all obey and comply with the lawful orders and decrees of the hearing and determination of his present motion, for which no previous application has been made.

Joseph Popkin.

Sworn to before me this 8th day of December, 1930.
Morris Katz, Notary Public, N. Y. Co.

[fol. 7] In United States District Court, Southern District of New York

[Title omitted]

Ancillary Order for Examination and Order of ne Exeat—Dated December 4, 1930

Upon the petition of D. Ginsberg & Sons, Inc., duly verified, and it appearing that an involuntary petition in bankruptcy has been filed and is now pending against the said Foster Construction Corporation in the United States District Court for the Eastern District of New York, and that the petitioner is a creditor of the bankrupt corporation, and that the petitioner is, under the circumstances set forth in the petition herein, a proper party to make this [fol. 8] application, and that said petitioner has been duly authorized to apply to this court for an order of examination of certain witnesses within the jurisdiction of this court and for an order ne exeat, and that it is proper and necessary in aid of the said petitioner that an ancillary order for the examination of said persons issue and that an order ne exeat issue,

Now, upon motion of Leo J. Linder, attorney for said petitioner, it is

Ordered, that the prayer of said petition, be and hereby is granted and an ancillary order of examination in aid of said petitioner as creditor of said bankrupt issue, and it is further

Ordered, that Joseph Popkin appear before Oscar W. Ehrhorn, Esq., who is hereby appointed Special Commissioner for that purpose at a time and place to be designated by him and be examined concerning the acts, conduct and property of the said bankrupt; and it is further

Ordered, that the United States Marshal for the Southern District of New York, or any of his deputies, be, and he is hereby commanded that, without delay, he apprehended and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of [fol. 9] $10,000 to be approved by this court, or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Henry W. Goddard, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF D. GINSBERG & SONS, INC., SUBMITTED ON APPLICATION FOR ORDER

To the United States District Court for the Southern District of New York:

The petition of D. Ginsberg & Sons, Inc., shows:

[fol. 10] 1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That on the 23rd day of September, 1929, a petition in bankruptcy was filed against the above named bankrupt in the United States District Court for the Eastern District of New York, and thereafter Foster Construction Corporation was duly adjudicated a bankrupt in said court.

3. That Joseph Popkin is the president of the bankrupt corporation and he has withdrawn and failed to account for more than $100,000.00 of the cash funds of the bank-

rupt corporation. Joseph Popkin has never been examined in the bankruptcy proceedings hereinabove referred to. In 1929, Joseph Popkin fled to Canada to avoid arrest and remained out of the jurisdiction until such time as he believed his creditors had been placated into not taking any action against him. On January 27, 1930, a ne exeat order was made by the United States District Court for the Eastern District of New York commanding the United States Marshal for the said district to take Joseph Popkin into custody, but Joseph Popkin again fled the jurisdiction of the United States District Court for the Eastern District of New York, and in spite of the strenuous efforts made by your petitioner and other creditors, no trace could be found of him. Your petitioner discovered a few days ago that Joseph Popkin had come back to Greater [fol. 11] New York and applied for and procured an order yesterday, December 3, 1930, made by Honorable Robert A. Inch, District Judge, commanding the United States Marshal for the Eastern District, to arrest Joseph Popkin or cause him to give bail in the sum of $10,000.00. That officers of your petitioner, with a Deputy United States Marshal of the Eastern District proceeded to Manhattan yesterday afternoon upon ascertaining that he was in an office building in Manhattan, and followed him from an office building in Manhattan to Jersey City, where Joseph Popkin apparently went to spend last night. Your petitioner believes that Joseph Popkin is aware that he is being hunted and that he has fled to Jersey City believing that he was safe there. Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City, but believes it imperative that an order directing his examination and directing a United States Marshal for this district to take him into custody is necessary. Your petitioner believes that if Joseph Popkin is not apprehended immediately that he will again run away and leave the United States as he did before.

4. This application is made by your petitioner instead of by a trustee in bankruptcy, who was appointed herein in June, 1930, because the trustee in bankruptcy, who was appointed herein, is Benjamin Kronenberg, an attorney, who at one time represented the bankrupt corporation, and [fol. 12] who, your petitioner believes, is friendly with

Joseph Popkin. The trustee in bankruptcy was elected over the objection of your petitioner and various other creditors, which objection was specifically grounded on the impropriety of his serving as trustee by reason of his relations with the bankrupt corporation, but that, nevertheless, in spite of this objection, Benjamin Kronenberg was appointed trustee by virture of the votes of certain creditors, including creditors who had at one time been personally represented by the same Mr. Kronenberg. That your petitioner believes that it would endanger the interests of creditors to even notify Mr. Kronenberg of this application.

5. That Joseph Popkin's testimony is material and necessary in aid of the petitioner as to the acts, conduct and property of the bankrupt, and that Joseph Popkin was in a number of office buildings yesterday in the Borough of Manhattan, apparently transacting some business there, and your petitioner believes that he may be found in the Borough of Manhattan some time today. Your petitioner further states that Joseph Popkin slept last night in a residence in Jersey City, and that he may appear again in Jersey City some time during today or this afternoon. That Joseph Popkin will unquestionably leave the jurisdiction of this court and, in all probability, leave the jurisdiction of the United States for a third time if he is not apprehended immediately.

[fol. 13] 6. That ancillary proceedings to obtain this order of examination and ne exeat order are necessary in this District, and on the 4th day of December, 1930, the United States District Court for the Eastern District of New York, by an order entered therein, duly authorized the petitioner to apply to this court for an ancillary order of examination and order of arrest.

Wherefore petitioner respectfully prays for ancillary proceedings in this district in aid of petitioner and for an order for the examination of Joseph Popkin before a referee or special commissioner to be appointed in this district concerning the acts, conduct or property of the bankrupt herein, and for an order commanding the United States Marshal, or any of his deputies, for this district, to

apprehend and take Joseph Popkin into his custody, and for other and further relief as may be necessary.

Dated December 4, 1930.

D. Ginsberg & Sons, Inc., by Dora Ginsberg, Petitioner.

[fol. 14] *Duly sworn to by Dora Ginsberg. Jurat omitted in printing.*

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

WRIT NE EXEAT, MADE DECEMBER 4, 1930

To the United States Marshal for the Southern District of New York or any of his deputies:

Whereas, it appears that an order of the United States District Court for the Eastern District of New York has been made by Honorable Robert A. Inch, District Judge, on the 4th day of December, 1930, authorizing and empowering application for an ancillary order of examination of certain necessary witnesses, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey; and

Whereas, it appears to the satisfaction of the United States District Court for the Southern District of New York, sitting in bankruptcy, on the order of the United States District Court for the Eastern District of New York, dated December 3, 1930, made by Honorable Robert A. [fol. 16] Inch, District Judge, on the petition of D. Ginsberg & Sons, Inc., duly verified, and on the order previously made herein by Honorable Mortimer W. Byers, District Judge, dated January 27, 1930, and the papers upon which the said order of January 27, 1930, was granted, including the petition of Leo J. Linder, duly ver-fied the 27th day of January, 1930, and the affidavit of Nathaniel M. Satloff, duly verified the 27th day of January, 1930; and from the petition of D. Ginsberg & Sons, Inc., verified the 4th day of December, 1930, that Joseph Popkin, president of the bankrupt corporation has failed and refused to submit

himself to examination pursuant to orders and decrees of the United States District Court for the Eastern District of New York, and has evaded service of an order to show cause directing him to show cause why he should not be punished for contempt, and is about to leave the jurisdiction and district of this court to avoid examination and to avoid accounting for substantial sums of money appropriated by the said Joseph Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this court

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin, an officer of the bank-
[fol. 17] rupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of $10,000 to be approved by this court, or the Clerk thereof, that he the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, in default of which he is to be lodged in New York County Jail, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Dated December 4, 1930.

Henry W. Goddard, U. S. D. J.

Prisoner Popkin released from custody upon executing and filing a bond in the sum of $10,000.

12-6-30.

Charles Weiser, Clerk United States District Court.

[fol. 18] IN UNITED STATES DISTRICT COURT, EASTERN NEW YORK

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt

ORDER MADE THE 4TH DAY OF DECEMBER, 1930, ALLOWING APPLICATION IN THE SOUTHERN DISTRICT FOR ANCILLARY PROCESS AND ORDER OF NE EXEAT

D. Ginsberg & Sons, Inc., a creditor herein, having made application for leave to institute ancillary proceedings in the United States District Court for the Southern District of New York and for the District of New Jersey, for the purpose of obtaining an ancillary order of examination of Joseph Popkin, President of the bankrupt corporation [fol. 19] herein, and of certain witnesses, being or residing in the said Districts, and for the purpose of obtaining ne exeat orders directed to the Marshals of the said two Districts, and it appearing that the said application is necessary, and proper,

Now, upon reading and filing the petition of D. Ginsberg & Sons, Inc., a creditor herein, duly verified, and upon motion of Leo J. Linder, Attorney for the petitioner it is

Ordered that the application herein be and it hereby is granted, and D. Ginsberg & Sons, Inc., be and it hereby is authorized and empowered to apply to the United States District Court for the Southern District of New York and for the District of New Jersey, *and* for an ancillary order of examination of such witnesses within the jurisdiction of said courts as may be necessary as to the acts, conduct or property of the bankrupt corporation herein, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey.

Robert A. Inch, U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF D. GINSBERG & SONS, INC., SUBMITTED IN SUPPORT OF APPLICATION MADE IN THE EASTERN DISTRICT OF NEW YORK FOR THE ISSUANCE OF ANCILLARY PROCESS IN THE SOUTHERN DISTRICT

To the United States District Court for the Eastern District of New York:

The petition of D. Ginsberg & Sons, Inc., shows:

1. That your petitioner is a creditor of the above named bankrupt.

2. Having duly filed its proof of claim herein in the sum of $14,958.15, a petition in involuntary *petition in* bankruptcy was heretofore filed against the said bankrupt, who was thereafter adjudicated such.

3. That upon the petition of your petitioner, verified the 2nd day of December, 1930, Honorable Robert A. Inch, Dis-
[fol. 21] trict Judge, granted an order dated December 3, 1930, directing the United States Marshal for the Eastern District of New York, to take into his custody Joseph Popkin, president of the above named bankrupt corporation, or cause him to give sufficient bail in the sum of $10,000.00, that he will not depart from the jurisdiction of this Court.

4. That officers of your petitioner, in company with a Deputy Marshal of the United States Marshal's office for the Eastern District of New York, and a clerk employed in the office of Leo J. Linder, attorney for your petitioner herein, found Joseph Popkin in the Borough of Manhattan, but the said Deputy Marshal was not able to effect service on him there because he was outside of his territorial jurisdiction. Your petitioner caused Joseph Popkin to be followed and traced him to Jersey City, where he was late last night. Your petitioner believes that Joseph Popkin will stay out of the jurisdiction of this Court and will make it impossible for the United States Marshal for the Eastern District of New York or his deputies, to effect service of the order of arrest upon him within the territorial juris-

diction of this Court, and that it is absolutely necessary for the protection of the interests of the creditors that leave be granted to your petitioner to apply for ancillary orders of examination and orders of arrest to the United States [fol. 22] District Court for the Southern District of New York, and the United States District Court for the District of New Jersey.

5. This application is made by your petitioner, and not by the receiver or trustee herein, because one Benjamin Kronenberg, an attorney, is the trustee herein. Your petitioner believes that Benjamin Kronenberg represents interests which are not unfriendly to Joseph Popkin, and has, indeed, at one time represented the bankrupt corporation. Your petitioner is convinced that Benjamin Kronenberg will do nothing to apprehend Joseph Popkin and that it would endanger the interests of creditors that Benjamin Kronenberg should even be advised of the present application.

6. That in the administration of this estate it is absolutely imperative that Joseph Popkin, who, as your petitioner is informed, has failed to acount for over $100,000.00 of the funds of the bankrupt corporation, withdrawn by him personally, be apprehended and taken into custody and that he be forthwith examined.

Wherefore your petitioner prays for an order granting it permission to apply to the United States District Courts for the Southern District of New York and the District of [fol. 23] New Jersey, for ancillary orders of examination of Joseph Popkin and witnesses whose testimony is desired as to the acts, conduct and property of the bankrupt.

Dated December 4, 1930.

D. Ginsberg & Sons, Inc., by Dora Ginsberg, Petitioner.

Duly sworn to by Dora Ginsberg. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

WRIT NE EXEAT, MADE THE 3RD DAY OF DECEMBER, 1930

To the United States Marshal for the Eastern District of New York or any of his deputies:

Whereas, it appears to the satisfaction of the District Court of the United States for the Eastern District of New York, sitting in bankruptcy, on the petition of D. Ginsberg & Sons, Inc., duly verified, and on the order previously made herein by Honorable Mortimer W. Byers, District Judge, dated January 27, 1930, and the papers upon which the said order of January 27, 1930, was granted, including the petition of Leo J. Linder, duly verified the 27th day of January, 1930, and the affidavit of Nathaniel M. Satloff, duly verified the 27th day of January, 1930, wherefrom it appears that Joseph Popkin, the president of the bankrupt corporation, has failed and refused to submit himself to examination pursuant to the orders and decrees of this Court, and has evaded service of an order to show cause directing him to show cause why he should not be punished for contempt, and is about to leave the district [fol. 25] and the jurisdiction of this Court to avoid examination, and to avoid accounting for substantial sums of money appropriated by Joseph Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this Court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this Court.

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of $10,000, Ten Thousand Dollars, to be approved by this Court, or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial juris-

diction of this Court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the Court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Dated December 3, 1930.

R. A. Inch, U. S. D. J.

[fol. 26] In United States District Court, Eastern District of New York

[Title omitted]

Petition of D. Ginsberg & Sons, Inc., Submitted in Support of Application for a Writ ne Exeat Made by the District Court of the Eastern District of New York on the 3rd Day of December, 1930

The petition of D. Ginsberg & Sons, Inc., respectfully shows and alleges:

1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That a petition in involuntary bankruptcy having heretofore been filed against the above named bankrupt, and no answer having been filed the above named bankrupt was adjudicated such.

3. That your petitioner's attorney, Leo J. Linder, Esq., is also attorney for various other creditors of the above named bankrupt, and that in behalf of Halsey Marble & Tile Works, Inc., one of the said creditors, and your peti-
[fol. 27] tioner, Mr. Linder applied for and procured an order, made by Honorable Mortimer W. Byers, District Judge, on January 7, 1930, appointing Honorable Isaac F. Russell, Special Commissioner, and directing Joseph Popkin, president of the bankrupt corporation, to appear before the Special Commissioner. As appears from the verified petition of Leo J. Linder, a copy of which it attached hereto, subpœnas were duly issued by the Clerk of this Court to the said Joseph Popkin, and on January 8, 1930, service of the

subpœna on said Joseph Popkin was effected. Joseph Popkin did not appear for examination on January 10, 1930, as directed. The examination was adjourned from January 10, 1930, to January 17, 1930, and Herman Rosenblatt, Esq., an attorney, of 291 Broadway, New York City, who had filed a notice of appearance herein as attorney for the bankrupt corporation, was notified of the non-appearance of Joseph Popkin and of the adjourned date. Your petitioner is advised by its attorney, Mr. Linder, that Mr. Linder spoke with Mr. Rosenblatt, who advised Mr. Linder that he had communicated with Mr. Joseph Popkin, and that Joseph Pipkin denied having been served with a subpœna. Mr. Rosenblatt's letter contained the following statement:

[fol. 28] "Notwithstanding the failure to serve said subpœna, as alleged in your letter I have arranged with Joseph Popkin that I will produce him on the 24th day of January, 1930, at the Post Office Building for your examination."

The examination of Joseph Popkin was adjourned from January 17, 1930 to January 21, 1930, and Mr. Rosenblatt was advised of the adjournment. On January 21, 1930, when Joseph Popkin failed to appear, Special Commissioner Russell executed a certificate certifying Joseph Popkin for contempt of Court, a copy of which certificate is attached hereto, and on January 22, 1930, an order to show cause was made by District Judge Byers directing Joseph Popkin to show cause why he should not be punished for contempt. On January 24, 1930, Joseph Popkin again failed to appear, but Mr. Lesser, an attorney associated with Mr. Rosenblatt, the attorney for the bankrupt, appeared and stated that he believed that Joseph Popkin was out of town. Mr. Morris Ginsberg, vice-president of your petitioner, who verifies this petition, was, during all this time, in constant touch with Mr. Linder and endeavored to assist him in every way possible in effecting service on [fol. 29] Joseph Popkin, and in apprehending him. Your petitioner states that its officers made diligent efforts in co-operation with Mr. Linder and process servers employed by him, to serve Mr. Joseph Popkin with a copy of the order to show cause in the contempt proceedings, but without success.

On January 27, 1930, on the application of Mr. Linder, as attorney for creditors, an order was made by District Judge Byers commanding the United States Marshal for the Eastern District of New York to apprehend and take into custody Joseph Popkin, and to bring him forthwith before the said District Judge for examination. The said order was, as your petitioner is informed by Mr. Linder, immediately delivered to the United States Marshal, who thereafter, accompanied by a process server employed by Mr. Linder, endeavored to find Joseph Popkin. From that day, January 27, 1930, to this, the United States Marshal has never succeeded in finding Joseph Popkin, and the ne exeat order has lain dormant in the files of the United States Marshal.

In the meantime, Mr. Linder, in the interests of Halsey Marble & Tile Works, Inc., your petitioner, and other creditors, who had retained him, proceeded with the examina- [fol. 30] tion of witnesses before Special Commissioner Russell, conducting hearings throughout January, February and March, 1930. Benjamin Kronenberg, Esq., an attorney of 302 Broadway, New York City, who had at one time represented the bankrupt corporation, who had been appointed receiver in these proceedings, and who was subsequently appointed trustee in bankruptcy, was called as a witness, and on January 28, 1930, he testified as follows:

"Q. When did you last see Mr. Joseph Popkin?
A. I spoke to him the other day over the telephone. * * *
Q. When did you see him personally?
A. The early part of last week."

His son, Murray J. Popkin, who had also been subpœnaed, and who had likewise failed to appear for examination, did make his appearance on February 4, 1930. He testified that he "knew in the beginning of January, 1930, that bankruptcy proceedings were pending against Foster Construction Corporation," and that Mr. Kronenberg had told him, in January, 1930, that Mr. Linder desired to ex- [fol. 31] amine him. Murray J. Popkin, examined with respect to his father's whereabouts, testified as follows:

"Q. Where is your father?
A. I don't know.
Q. When did you last see him?

A. About two or two and a half weeks ago.
Q. Where?
A. Home.
Q. Have you heard from him?
A. No, sir.
Q. Have you made any attempt to locate him?
A. I have not made any attempt to locate him.
Q. Is he lost?
A. I would not say that he is lost.
Q. Have you reported his disappearance to the Police Department?
A. No, sir.
Q. Where is your mother?
A. With him (pp. 143-145, Testimony before Special Commissioner Russell).

The Murray J. Popkin who so testified was secretary of the bankrupt corporation. He testified that he had "been working for (his father) practically all his life" (p. 174, Testimony before Special Commissioner Russell), and that he was "with him all the time practically" (p. 175, Testimony before Special Commissioner Russell).

[fol. 32] Jean Popkin, a daughter of Joseph Popkin, was examined on February 7, 1930. She testified that she lived with her father. Her testimony was as follows:

Q. When did you last see him?
A. Three weeks ago today.
Q. That is on January 17?
A. Yes, sir.
Q. Will you look at the calendar and make sure of the date?
A. Yes, sir; three weeks ago today.
Q. Where was it that you last saw him?
A. At the house, when he left.
Q. Was your mother there at the same time?
A. Yes, sir.
Q. Did he tell you that he was going away?
A. Yes, sir.
Q. Did he tell you where he was going?
A. No, sir.
Q. Did you ask him?

A. No, sir (p. 199, Testimony before Special Commissioner Russell).

Q. Did he pack his bags?

A. Yes, sir (p. 201, idem.).

Q. Have you heard from your father or mother since January 17?

A. I have not (p. 202. idem.).

[fol. 33] Murray J. Popkin examined on February 7, 1930, also testified that he had not heard from his father. On February 11, 1930, Florence Popkin, another daughter of Joseph Popkin, was examined and she also testified that she last saw her father on or about January 17, 1930, and that she had no idea where he was. On March 4, 1930, Murray J. Popkin was again examined and again swore that he had not seen his father since he left in January. He did, however, state that he had received a letter from his father around the 17th or 18th of February. The letter was written from the Commodore Hotel, in Washington, D. C. He stated that he sent him a special delivery letter to the Commodore Hotel, but that he had not heard from him since.

Examinations were continued at frequent intervals until the latter part of March, 1930, and at these examinations Murray J. Popkin repeated the statement that he had not heard from his father, but believed him to be out of town.

Throughout this time and ever since January 27, 1930, your petitioner, together with various other creditors of Foster Construction Corporation, have independently endeavored to trace Joseph Popkin. Your petitioner, to-[fol. 34] gether with these other creditors, employed William J. Burns detective agency, and the operatives employed by this agency, endeavored to track down clues and rumors that Mr. Joseph Popkin was at one time in Toronto, Canada, at another time in a city in the south, at other times at various places in New York and New Jersey, but without any success whatsoever. Joseph Popkin had apparently checked in at the Commodore Hotel on the day when the letter to his son was mailed, but he had been careful to immediately check out the following day leaving no forwarding address.

Since the examinations before Special Commissioner Russell were suspended the following has occurred so far

as the bankruptcy proceedings themselves are concerned. In June, 1930, a first meeting of creditors was held before Hon. Alfred J. Hoffman, Referee in Bankruptcy, and at that meeting Benjamin Kronenberg, Esq., who admitted on examination before Special Commissioner Russell that he had, in 1929, represented the bankrupt corporation, was elected trustee in bankruptcy. Mr. Kronenberg was elected over the objection of your petitioner and four other creditors of the bankrupt corporation, whose filed claims aggregated more than $51,000.00. This objection, which was [fol. 35] taken by your petitioner's attorney, Mr. Linder, was expressed, not only by a vote against his appointment, but by the objection specifically expressed as to the propriety of his serving as trustee in bankruptcy by reason of his relations with the bankrupt corporation and by reason of the fact, further, that your petitioner and the four other creditors represented by Mr. Linder believed that there was a cause of action against Mr. Kronenberg for breach of trust based upon Mr. Kronenberg's conduct while a trustee of the real property of the bankrupt corporation under a deed of trust executed in April, 1929, before the bankruptcy proceedings. A deficiency judgment of $397,850.00 having been procured by Three Ems Bee Jay Realty Corporation, this corporation, which had formerly been represented by the same Mr. Kronenberg, its attorney, filed its proof of claim for that amount, and by virtue of this claim was enabled to effectively vote for the appointment of Mr. Kronenberg as trustee. Mr. Kronenberg, since his appointment as trustee, has not conducted any examination whatsoever and the entire bankruptcy proceedings have apparently lapsed.

In this condition of affairs, Joseph Popkin has apparently regarded it as safe for him to return to the [fol. 36] County of Queens. Your petitioner has just discovered that Joseph Popkin is in town and believes that he can be apprehended without any trouble in the course of the next few days, provided he has no notion that anybody desires to effect service upon him. Your petitioner is convinced by everything that has happened in this case that, if Joseph Popkin learns that he is wanted for examination he will disappear again immediat-ly.

The disappearance of Joseph Popkin in January, 1930, is his second disappearance in the face of a threatened

prosecution of him by his creditors. Mr. Kronenberg testified that, in 1929, Joseph Popkin arranged with him to call a meeting of the creditors of the bankrupt corporation at the office of Mr. Kronenberg, and that immediately after he made this arrangement he left this country and went to Canada. Mr. Morris Ginsberg an officer of your petitioner, who verifies this petition, was present at the meeting of creditors which Kronenberg called in April, 1929. The creditors present were not informed that Joseph Popkin had left the country, but were placated into not taking any action against Joseph Popkin or the bankrupt corporation upon a consideration of the equities and the financial con-
[fol. 37] dition of the bankrupt corporation at that time. Just when Joseph Popkin returned to this country after April, 1929, your petitioner does not know, but, in any event, your petitioner believes that he did not return until he was certain that the creditors were placated and would not proceed with any investigation. Joseph Popkin remained in this country then until January, 1930, when your petitioner and the other creditors who had retained Mr. Linder, had made it clear that they proposed to have a thorough and complete investigation of the affairs of the bankrupt corporation. On this second disappearance he did not return until so many months had elapsed that he was again satisfied that the creditors had, in all probability, forgotten about the matter and would not disturb him. There cannot be the slightest question that Joseph Popkin does not dare to submit to examination and will go to almost any length to avoid examination. Your petitioner requests that the ne exeat order herein prayed for is the only measure that will effectively guard and protect the interests of the creditors.

4. Your petitioner is informed by the accountant whom Mr. Linder employed that Joseph Popkin, president of the
[fol. 38] bankrupt corporation, has drawn checks to his personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of account of the bankrupt corporation. It is of vital importance for the protection of the interests of all the creditors that Joseph Popkin be not permitted to leave the jurisdiction at this time without first having appeared for examination and accounted for these moneys.

5. That no previous application has been made for the order prayed for herein except that an application was made for the order of District Judge Byers, dated, January 27, 1930, and such order was granted under the circumstances hereinbefore stated.

Wherefore your petitioner prays for an order requiring the Marshal of this district forthwith to apprehend and take into his custody Joseph Popkin, president of the bankrupt corporation herein, to the end that he may not depart from the jurisdiction of this court, and for such other and further relief as may be just and proper.

Dated December 2, 1930.

D. Ginsberg & Sons. Inc., by Morris Ginsberg, Vice-President.

[fol. 39] *Duly sworn to by Morris Ginsberg. Jurat omitted in printing.*

[fol. 40] In United States District Court, Eastern District of New York

[Title omitted]

Order of Arrest Made the 27th Day of January, 1930

To the United States Marshal for the Eastern District of New York or any of his deputies:

Whereas, it appears to the satisfaction of the District Court of the United States for the Eastern District of New York, sitting in bankruptcy, on the petition of Leo J. Linder, duly verified, and the affidavit of Nathaniel N. Satloff, duly verified the 27th day of January, 1930, wherefrom it appears that Joseph Popkin and Murray J. Popkin, the president and secretary, respectively, of the bankrupt corporation, have failed and refused to submit themselves to examination pursuant to the orders and decrees of this Court, and have evaded service of an order to show cause directing them to show cause why they should [fol. 41] not be punished for contempt, and are about to leave the district and the jurisdiction of this court to avoid examination, and to avoid accounting for sub-

stantial sums of money appropriated by Joseph Popkin and Murray J. Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this Court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this court,

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin and Murray J. Popkin, officers of the said bankrupt corporation, and bring them forthwith before me for examination.

Jan. 27, 1930.

Mortimer W. Byers, U. S. D. J.

[fol. 42] In United States District Court, Eastern District of New York

[Title omitted]

Petition of Leo J. Linder in Support of Application for an Order of Arrest Made the 27th Day of January, 1930, by the District Court for the Eastern District of New York

The petition of Leo J. Linder, respectfully shows and alleges:

1. That he is attorney for Halsey Marble & Tile Works, Inc., a creditor of the above named bankrupt.

2. That a petition in involuntary bankruptcy was heretofore filed against the above named bankrupt, and, no answer having been filed, the above named bankrupt was adjudicated such.

3. That on the application of the creditor represented by your petitioner, and on your petitioner's motion, an order was duly made by Mr. Justice Byers, District Judge, on January 7, 1930, appointing Honorable Isaac Franklin Russel, Special Commissioner and directing Joseph Popkin, [fol. 43] president of the bankrupt corporation, Murray J. Popkin, his son, secretary of the bankrupt corporation, and Benjamin Kronenberg, Esq., an attorney of 302 Broad-

way, New York City, to appear before the Special Commissioner.

4. That your petitioner thereupon immediately procured subpœnas to be duly issued by the Clerk of this court to the aforementioned parties, and on January 8, 1930, service of subpœnas on Joseph Popkin and Murray J. Popkin was effected. Neither Joseph Popkin, nor his son, Murray J. Popkin, appeared for examination on January 10, 1930, at the time and place designated in the subpœnas and their default was duly noted. On January 10, 1930, Benjamin Kronenberg, Esq., an attorney who at one time represented the bankrupt corporation and the witnesses who failed to appear for examination, appeared for examination and in the course of his examination testified that in April, 1929, Joseph Popkin, the president, had come to him and told him that he wanted Mr. Kronenberg to call a meeting of his creditors because he could not continue any further and that immediately after this Joseph Popkin left the country. Mr. Kronenberg testified that he finally located Mr. Joseph Popkin in Toronto, Canada, where he had followed him, and that in Canada Joseph Popkin gave back to Mr. Kronen- [fol. 44] berg $27,500.00 in cash, which Mr. Kronenberg, then turned over to a client of his in reduction of a mortgage obligation of the bankrupt corporation. While Mr. Kronenberg testified that this sum "belonged to his client", his testimony indicates that the sum of money involved was funds of the bankrupt corporation. On the following day your petitioner telephoned to Herman Rosenblatt, Esq., an attorney at 291 Broadway, New York, who has filed a notice of appearance herein as attorney for the bankrupt, and told Mr. Rosenblatt that Special Commissioner Russell had adjourned the examination held before him on January 10 to January 17, 1930, at two o'clock, and if Mr. Rosenblatt would produce Mr. Popkin at that time your petitioner would not institute contempt proceedings. Mr. Rosenblatt told your petitioner over the telephone that he would communicate with Mr. Popkin and advise your petitioner by letter. On January 11, 1930, your petitioner wrote to Mr. Rosenblatt advising him of the default of Joseph Popkin and Murray J. Popkin in appearance on January 10, 1930, and requesting that Mr. Rosenblatt advise your petitioner immediately as to whether his clients, the officers of the bankrupt corporation, would appear for examination

on January 17, 1930. On January 13, 1930, your petitioner spoke to Mr. Rosenblatt again and was informed by him [fol. 45] that he had communicated with Joseph Popkin and that Joseph Popkin denied that he had been served with any subpœna but that he was entirely willing to submit to examination. Mr. Rosenblatt advised your petitioner that he would write him confirming this. On January 16, 1930, your petitioner received a letter from Mr. Rosenblatt in which Mr. Rosenblatt stated that Joseph Popkin and Murray J. Popkin both denied having been served with a subpœna. Mr. Rosenblatt's letter, however, contained the following statement: "Notwithstanding the failure to serve said subpœnas, as alleged in your letter, I have arranged with Joseph Popkin that I will produce him on the 24th day of January, 1930, at the Post Office Building for examination." Upon receipt of this letter your petitioner wrote Mr. Rosenblatt again advising him that the examination set for January 17, 1930, would be adjourned to Tuesday, January 21, 1930, and requesting that Mr. Rosenblatt produce Joseph Popkin on January 21st. Mr. Rosenblatt telephoned your petitioner and told him that he would try to arrange with Mr. Popkin for his appearance on Tuesday, January 21, 1930, but that in any event Mr. Popkin would appear on January 24, 1930, at two o'clock. On January 21, 1930, when neither Mr. Rosenblatt, Joseph Popkin nor his son, Murray J. Popkin, appeared, your petitioner submitted a certificate certifying Joseph Popkin and Murray [fol. 46] J. Popkin in contempt to Special Commissioner Russel, and the certificate was executed and a copy thereof is attached hereto. Immediately your petitioner prepared an order to show cause why Joseph Popkin and Murray J. Popkin should not be punished for contempt of court and on January 22, 1930, on the petition of Halsey Marble & tile Works, Inc., the creditor represented by your petitioner, an order to show cause was made by Mr. Justice Byers directing Joseph and Murray J. Popkin to show cause why they should not be punished for contempt. The order to show cause was issued to Joseph Popkin and Murray J. Popkin for service, and, as is stated in the affidavit of Nathaniel M. Satloff, annexed hereto, service thereof could not be effected. On January 24, 1930, your petitioner saw Mr. Rosenblatt and was assured by Mr. Rosenblatt that Joseph Popkin would be present for examination on that

afternoon at two o'clock, Joseph Popkin did not appear at the time set for the examination. Almost three quarters of an hour after two o'clock, Reuben Lesser, Esq., an attorney associated with Herman Rosenblatt, Esq., attorney for the bankrupt, appeared and stated that he had been sent there by Mr. Rosenblatt, but that he did not know anything about Mr. Popkin's whereabouts. Mr. Lesser stated that he believed that Joseph Popkin was out of town. [fol. 47] Your petitioner retained Hyman Levine, an accountant, to examine into such books and records of the bankrupt corporation as were in the custody of Benjamin Kronenberg, Esq., and in the course of his investigation the accountant has met Murray J. Popkin and examined certain of the records of the bankrupt corporation. Murray J. Popkin, who is not, as Mr. Rosenblatt averred in his letter, out of town, declined to give the accountant any information as to the whereabouts of his father, but on Thursday, January 23, 1930, when the accountant went to Woodside National Bank, Woodside, New York, with a subpœna issued by the Clerk of this court, he was informed that Joseph Popkin had been there earlier that morning, had spoken to one of the officers and left word that under no circumstances should any records or data concerning his accounts be shown to your petitioner or your petitioner's accountant. From the foregoing your petitioner respectfully states that Joseph Popkin is evading the service of the process of this court upon him and is secreting himself. Diligent efforts to discover his whereabouts have been made by your petitioner, the accountant, the process server whose affidavit is annexed hereto, and persons in the employ of the process server. The investigations made thus far do not reveal the place where Joseph Popkin is hiding. His attorney, Mr. Rosenblatt, knows where that [fol. 48] place is, or, in any event, knows how to reach Mr. Popkin, because Mr. Rosenblatt told your deponent that he had spoken to Mr. Popkin and wrote your petitioner that he had "arranged with" Joseph Popkin that he should appear on January 24, 1930. Immediately after Joseph Popkin arranged with his then attorney, Benjamin Kronenberg, Esq., to call a meeting of creditors he left this country and went to Canada. Mr. Kronenberg called this meeting of creditors and the creditors were placated into not taking any action against Joseph Popkin at that time. Just when

Joseph Popkin returned to this country your petitioner does not know, but in any event your petitioner believes that he did not return until it was certain that the creditors had been placated and would not proceed with any investigation just then. Your petitioner believes from the statements made to Nathaniel M. Satloff, as stated in his affidavit, annexed hereto, that he has told various persons that he was going away and that there cannot be any question but that Joseph Popkin is preparing to leave the jurisdiction. On Thursday last he was still within the jurisdiction. Your petitioner believes that he is still here. Mr. Rosenblatt, Joseph Popkin's attorney, has stated volubly over the telephone and in his letter that Joseph Popkin was not served with a subpœna. Whether he was served or not [fol. 49] (evidence sufficient to warrant the Special Commissioner in executing a certificate certifying them for contempt was presented to the Special Commissioner) there cannot be the slightest question but that Joseph Popkin knows that he is wanted for examination and that he does not wish just now to answer any questions. If Joseph Popkins is allowed to leave the jurisdiction it will seriously impair, impede and defeat the orders and decrees of this court, enable him to avoid examination and result in great loss to this estate, militate very seriously against the recovery of assets concealed and fraudulently disposed of by the bankrupt.

5. Your petitioner is informed by the accountant he has employed that Joseph Popkin and Murray J. Popkin, president and secretary, respectively, of the bankrupt corporation, have drawn checks to their personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of the account of the bankrupt corporation. It is of vital importance for the protection of the interests of all the creditors that Joseph Popkin and Murray J. Popkin be not permitted to leave the jurisdiction at this time without first having appeared for examination and accounted for these moneys.

[fol. 50] 6. That no previous application has been made for the order prayed for herein.

Wherein petitioner prays for an order requiring the marshal of this district forthwith to apprehend and take into his custody Joseph Popkin and Murray J. Popkin, the

president and secretary, respectively, of the bankrupt herein, to the end that he may not depart from the jurisdiction of this court and for such other and further relief as may be just and proper.

Dated January 27, 1930.

Leo J. Linder, Petitioner.

[fol. 51] *Duly sworn to by Leo J. Linder. Jurat omitted in printing.*

[fol. 52] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF NATHANIEL M. SATLOFF, SUBMITTED IN SUPPORT OF APPLICATION FOR AN ORDER OF ARREST MADE THE 27TH DAY OF JANUARY, 1930, BY THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
County of New York, ss:

Nathaniel M. Satloff, being duly sworn, deposes and says that he resides at 736 Willoughby Avenue, Brooklyn, New York. My business is that of serving processes for lawyers, and that on January 7, 1930, I received from Leo J. Linder, Esq., 67 Wall Street, New York City, two subpœnas duly issued by the United States District Court for the Eastern District of New York, to Joseph Popkin and Murray J. Popkin. These subpœnas were delivered by me to Isaac Greenberg, a process server in my employ, and on January 8, 1930, Issac Greenberg effected service of both subpœnas upon Joseph Popkin and Murray J. Popkin, respectively. [fol. 53] I have been informed by Mr. Linder that neither Joseph Popkin nor Murray J. Popkin appeared for examination on January 10, 1930, pursuant to the subpœnas.

On January 22, 1930, I received from Mr. Linder an order to show cause made by Mr. Justice Byers, a justice of this court, with instructions to serve copies of the said order to show cause on Joseph Popkin and Murray J. Ponkin.

On January 22, 1930, at about four thirty o'clock in the afternoon, I left Mr. Linder's office with the original and

copies of the order to show cause, and went to 43-06—159th Street, Flushing, Long Island, the address of Joseph Popkin and Murray J. Popkin. The premises here are an apartment house in which an apartment is occupied by "Popkin". I saw the superintendent of the building and asked her if Joseph Popkin lived there. She told me that he did and that his son, Murray J. Popkin, also lived there. She described both men to me. She also described to me the only woman in the apartment, and told me that this woman was the daughter of Joseph Popkin. I went up to the apartment and rang the bell and the woman, whom the superintendent described to me as Joseph Popkin's daughter, told me that he was not in and that neither Jo-
[fol. 54] seph Popkin nor Murray J. Popkin were home and that she did not know when they would be in. The woman would give me no further information.

This was at about six o'clock in the evening. I then went back to see the superintendent and she gave me another description of Joseph Popkin and Murray J. Popkin. I asked the superintendent when she had last seen Joseph Popkin and Murray J. Popkin and she told me that she had not seen them for about two weeks. I, nevertheless, waited in front of the "Popkin" apartment from six o'clock until ten thirty o'clock, but neither Joseph Popkin nor Murray J. Popkin came to the apartment.

The next morning, January 23, 1930, I went back to the same apartment house arriving there at about seven o'clock in the morning, and waited in front of the apartment house for Joseph Popkin or Murray J. Popkin to leave the apartment house, until eleven o'clock, but I did not see either of them leave. I left the apartment house for a few minutes to telephone Mr. Linder advising him that I would need some additional time to serve Joseph Popkin and Murray J. Popkin because the order to show cause allowed service only to four o'clock. I came back to Mr. Linder's office at about four thirty in the afternoon and found that the original order to show cause had been changed so as
[fol. 55] to permit service to eight o'clock. I went back to Flushing and waited for Joseph Popkin or Murray J. Popkin in front of the same apartment house until eight o'clock after having first rung the bell of the "Popkin" apartment and spoken to the same woman who was described to me as Joseph Popkin's daughter and having been informed by her that she could give me no information about

Joseph Popkin or Murray J. Popkin. After eight o'clock I endeavored to get some further information as to the whereabouts of Joseph Popkin and Murray J. Popkin and went to the apartment house known as "Stryker Hall", at one time controlled by the Popkins, at 37-76—62nd Street, Woodside, and there spoke to the superintendent of the building and was told by him that Joseph Popkin and Murray J. Popkin, his son, had been there a day or two before and that they had told him then that they were going away and would not be back for a little while.

Nathaniel M. Satloff.

Sworn to before me this 27th day of January, 1930. Oliver D. Willams, Commissioner of Deeds. New York Co. Clk. No. 147, Reg. No. 53-W-1. Kings Co. Clk. No. 32, Reg. No. 1030. Commission expires May 14, 1931.

[fol. 56] In United States District Court, Southern District of New York

M. 13, 320

In the Matter of Foster Construction Corp., Bankrupt

On motion to set aside an order for an ancillary examination and granting ex parte for a writ in the nature of a writ ne exeat, under which the President of the bankrupt, long a fugitive, was arrested in this district.

Louis Jersawit, Esq., Attorney for Joseph Popkin, the president of the bankrupt, in support of the motion to set aside writ.

Leo J. Linder, Esq., Attorney for D. Ginsberg & Sons, creditors on whose petition the writ was granted—in opposition thereto.

Opinion, Woolsey, D. J.

Woolsey, J.:

This motion is in all respects denied.

I. On December 3, 1930, Judge Inch in the Eastern District of New York, in which the above named proceedings in bankruptcy is pending, granted an order on application

of D. Ginsberg & Sons, a creditor in the said bankruptcy [fol. 57] proceedings, by which it was authorized and empowered to apply to this court:

1. For an ancillary order of an examination of Joseph Popkin and such other witnesses within this jurisdiction, as may be necessary, as to the acts, conduct and property of the bankrupt corporation, and

2. For orders ne exeat directed to the Marshal of the Southern District of New York.

This permission and authority was by the order extended also to the District of New Jersey, but that concerns us not. This order was filed in this district on December 4, 1930, as a foundation for the proceeding now before me. Cf. Babbitt vs. Dutcher, 216 U. S. 102, 114; ex parte Elkus, 216 U. S. 115, 116, 117.

II. In pursuance of this authority and permission and on the 4th day of December, 1930, Judge Goddard, on petition of D. Ginsberg & Sons granted, ex parte an order for ancillary examination of Joseph Popkin before Referee Erhhorn and an order ne exeat against him.

The petition on which this order was granted reads, as far as it is relevant, as follows:

"1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That on the 23rd day of September, 1929, a petition in bankruptcy was filed against the above named bankrupt in the United States District Court for the Eastern Dis- [fol. 58] trict of New York, and thereafter Foster Construction Corporation was duly adjudicated a bankrupt in said court.

3. That Joseph Popkin is the president of the bankrupt corporation and he has withdrawn and failed to account for more than $100,000.00 of the cash funds of the bankrupt corporation. Joseph Popkin has never been examined in the bankruptcy proceedings hereinabove referred to. In 1929, Joseph Popkin fled to Canada to avoid arrest and remained out of the jurisdiction until such time as he believed his creditors had been placated into not taking any action against him. On January 27, 1930, a ne exeat order

was made by the United States District Court for the Eastern District of New York commanding the United States Marshal for the said district to take Joseph Popkin into custody, but Joseph Popkin again fled the jurisdiction of the United States District Court for the Eastern District of New York, and in spite of the strenuous efforts made by your petitioner and other creditors, no trace could be found of him. Your petitioner discovered a few days ago that Joseph Popkin had came back to Greater New York and applied for and procured an order yesterday, December 3, 1930, made by Honorable Robert A. Inch, District Judge, commanding the United States Marshal for the Eastern District, to arrest Joseph Popkin or cause him to give bail in the sum of $10,000.00 That officers of [fol. 59] your petitioner, with a Deputy United States Marshal of the Eastern District proceeded to Manhattan yesterday afternoon upon ascertaining that he was in an office building in Manhattan, and followed him from an office building in Manhattan to Jersey City, where Joseph Popkin apparently went to spend last night. Your petitioner believes that Joseph Popkin is aware that he is being hunted and that he has fled to Jersey City believing that he was safe there. Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City, but believes it imperative that an order directing his examination and directing a United States Marshal for this district to take him into custody is necessary. Your petitioner believes that if Joseph Popkin is not apprehended immediately that he will again run away and leave the United States as he did before.

4. This application is made by your petitioner instead of by a trustee in bankruptcy, who was appointed herein in June, 1930, because the trustee in bankruptcy, who was appointed herein, is Benjamin Kronenberg, an attorney, who at one time represented the bankrupt corporation and who, your petitioner believes, is friendly with Joseph Popkin. The trustee in bankruptcy was elected over the objection of your petitioner and various other creditors, which objection was specifically grounded on the impropriety of his [fol. 60] serving as trustee by reason of his relations with the bankrupt corporation, but that, nevertheless, in spite of this objection, Benjamin Kronenberg was appointed trustee by virtue of the votes of certain creditors, including

creditors who had at one time been personally represented by the same Mr. Kronenberg. That your petitioner believes that it would endanger the interests of creditors to even notify Mr. Kronenberg of this application.

5. That Joseph Popkin's testimony is material and necessary in aid of the petitioner as to the acts, conduct and property of the bankrupt, and that Joseph Popkin was in a number of office buildings yesterday in the Borough of Manhattan, apparently transacting some business there, and your petitioner believes that he may be found in the Borough of Manhattan some time today. Your petitioner further states that Joseph Popkin slept last night in a residence in Jersey City, and that he may appear again in Jersey City some time during today or this afternoon. That Joseph Popkin will unquestionably leave the jurisdiction of this court and, in all probability, leave the jurisdiction of the United States for a third time if he is not apprehended immediately.

6. That ancillary proceedings to obtain this order of examination and ne exeat order are necessary in this District, and on the 4th day of December, 1930, the United States District Court for the Eastern District of New [fol. 61] York, by an order entered therein, duly authorized the petitioner to apply to this court for an ancillary order of examination and order of arrest."

III. The order so granted by Judge Goddard was duly served on Popkin, and on his arrest he posted a bond in the sum of $10,000, as fixed by Judge Goddard.

IV. The point made by the moving party that the papers are insufficient on their face is wholly without merit and will not be further mentioned.

It is urged, however, that as Popkin is not himself the bankrupt but merely the president of a bankrupt corporation, the order of ne exeat could not properly be granted for the reason that such a writ is limited to a party in suit and has not been extended to witnesses. The provenance and early history of the writ of ne exeat may be found in Beames on Ne Exeat, Chap. 1; and Spedding's Edition of Bacon's Works, Vol. VII, pp. 771, 772.

Cases are cited by the moving party as instances of the use of the writ, all of which involved the arrest of the bankrupt himself or of the party respondent in equity.

The question of the extension of the writ to a situation of the kind here shown is believed, therefore, to be of first impression.

It should be observed that the application was not made under Section 9, Sub. b of the Bankruptcy Act of 1898, which deals precisely with such a writ against the bankrupt, but under Sec. 2, Sub. 15 of the Bankruptcy Act which [fol. 62] endows Courts of bankruptcy as defined in the Act, with all the powers necessary to enforce the provisions of the act.

Bankruptcy Act of 1898, Sec. 2—inter alia, provides as follows (italics mine):

"That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (15) *make such orders, issue such processes* and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

A "process" is a "writ, warrant, subpœna or other formal writing issued by authority of law". Bouvier's Law Dictionary, Rawle's third Revision, Vol. 2, p. 2731. Judge Goddard's order clearly falls within this definition.

V. The incorporation of the bankrupt is invoked as creating a non-conductor between creditors and Popkin, the president of the bankrupt, and Klein vs. Board of Supervisors, 282 U. S. 19, 24, is cited.

This argument does not go far towards meeting the situation here.

The corporate entity is a non-conductor between stockholders and the outside world in most jurisdictions and in most cases. But this useful characteristic does not apply between an officer of a bankrupt corporation and the bankruptcy court, or its officers and mandatories.

Officers of a bankrupt corporation are regarded in courts [fol. 63] of bankruptcy as the bankrupts for many purposes which it is unnecessary to enumerate.

Cf. Remington on Bankruptcy, sec. 542, pp. 1977, 2384; and see also Remington on Bankruptcy, Sec. 3009; in Re Alpin vs. Lake Cotton Co., 131 Fed. 824, 825, 826; in re

Fixen & Co., 96 Fed. 748, 752; in re Horgan & Slattery, 98 Fed. 414, 415, 416 (C. C. A. 2); in Re Muncie Pulp Co., 139 Fed. 546, 548 (C. C. A. 2); in re Royce Dry Goods Co., 133 Fed. 100, 106; in re Cantelo Mfg. Co., 185 Fed. 276.

VI. The order issued by Judge Goddard, even if it be not regarded as a strictly canonical ne exeat order is in the nature of such an order and in the granting of it, I think Judge Goddard acted entirely within the powers granted to courts of bankruptcy by Sec. 2, Sub. 15 of the Bankruptcy Act to "make such orders and issue such processes * * * in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

Certainly the order here complained of is necessary under the circumstances here alleged—of which the truth is not challenged—in order to enforce the provisions of the Bankruptcy Act in connection with this bankrupt's estate.

If this court did not have the power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy Law with impunity.

Settle order on two days notice.

February 17, 1931.

Woolsey, United States District Judge.

[fol. 64] In United States District Court, Southern New York

In the Matter of Foster Construction Corporation, Bankrupt

Order Appealed From—Feb. 20, 1931

An ancillary order of examination and ne exeat having been granted herein pursuant to an order dated December 4, 1930, of the Eastern District, authorizing ancillary proceedings in this District, by Hon. Henry W. Goddard, District Judge, on the 4th day of December, 1930, directing the examination and apprehension of Joseph Popkin, president of the bankrupt corporation, and a motion having been made brought on by order to show cause, dated December 8, 1930, made by Hon. John M. Woolsey, District Judge

herein, for an order quashing, vacating and setting aside the said order of December 4, 1930, and the said motion [fol. 65] having come on regularly to be heard at a stated term of this court on December 10, 1930,

Now, on reading and filing the said order to show cause, dated December 8, 1930, and the affidavit of Joseph Popkin, sworn to the 8th day of December, 1930, annexed thereto, and the ancillary order of examination and ne exeat granted December 4, 1930, by Hon. Henry W. Goddard, District Judge herein, and the petition of D. Ginsberg & Sons, Inc., a creditor of the bankrupt herein, verified the 4th day of December, 1930, and the other papers in which the said order of ne exeat was granted, to wit: the order made by Hon. Robert A. Inch, District Judge of the United States District Court for the Eastern District of New York, directing the arrest of Joseph Popkin, dated December 3, 1930, the petition of D. Ginsberg & Sons, Inc., verified December 2, 1930, the order made by Hon. Mortimer W. Byers, District Judge of the United States District Court for the Eastern District of New York, granted the 27th day of January, 1930, directing the apprehension of the said Joseph Popkin, and the petition of Leo J. Linder, verified the 27th day of January, 1930, the affidavit of Nathaniel M. Satloff, verified the 27th day of January, 1930, submitted by the attorney for the petitioning creditor in opposition to the said motion, and Louis Jersawit, Esq., attorney for Joseph Popkin, appearing in support of said motion, and Leo J. Linder, Esq., attorney for D. Ginsberg & Sons, Inc., a creditor, appearing in opposition [fol. 66] thereto, and on all the papers and proceedings had herein, and the said application of Joseph Popkin to vacate the said order in so far as it provides for the examination of Joseph Popkin having been denied by order made by Hon. John M. Woolsey, District Judge herein, on the 11th day of December, 1930, and due deliberation having been had,

Now, on motion of Leo J. Linder, attorney for D. Ginsberg & Sons, Inc., a creditor, it is hereby

Ordered that the motion of Joseph Popkin, the respondent, be and it hereby is in all respects denied.

Woolsey, U. S. D. J.

[fol. 67] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Joseph Popkin, an officer of the above named bankrupt, files the following Assignment of Errors on his appeal from the Order made by the United States District Court for the Southern District of New York, on the 20th day of February, 1931:

Said United States District Court for the Southern District of New York therein erred as follows, to wit:

1. In denying the motion of Joseph Popkin, an officer of the above named bankrupt, to quash, vacate and set aside the ancillary order of ne exeat made and issued by Judge Goddard on the 4th day of December, 1930, based upon the petition of D. Ginsberg & Sons, Inc., a creditor of the above named bankrupt, bearing date and verified the 4th day of December, 1930, as it affirmatively appears from the ancillary order of ne exeat of Judge Goddard, bearing date the 4th day of December, 1930, that he had no power, authority or jurisdiction to issue an ancillary order of ne exeat, the said Joseph Popkin not being the bankrupt herein, and that it affirmatively appears from the [fol. 68] petition of D. Ginsberg & Sons, Inc., bearing date the 4th day of December, 1930, that said Joseph Popkin was not the bankrupt herein.

2. That Judge Goddard as one of the Judges of the United States District Court for the Southern District of New York, had no power, authority or jurisdiction to issue an ancillary order of ne exeat except against a bankrupt, and that Joseph Popkin was not the bankrupt herein.

3. That it affirmatively appears from the ancillary order of ne exeat issued by Judge Goddard on the 4th day of December, 1930, and the petition of D. Ginsberg & Sons, Inc., verified the 4th day of December, 1930, upon which the said order was predicated, that Joseph Popkin was not the bankrupt in the bankruptcy proceedings herein, but that the bankrupt was the Foster Construction Corporation above named.

4. That it affirmatively appears from said ancillary order of Judge Goddard and the petition of D. Ginsberg &

Sons, Inc., that the primary jurisdiction of the bankruptcy proceeding was in the United States District Court for the Eastern District of New York, and that no ancillary order of ne exeat could issue out of the United States District Court for the Southern District of New York, for the apprehension of said Joseph Popkin, and that Judge Goddard was therefore without power, authority or jurisdiction to issue said order of ne exeat.

5. That the only court that could issue a writ or order of ne exeat was the Court of primary jurisdiction, that is, the United States District Court for the Eastern District [fol. 69] of New York, where the bankruptcy proceedings herein were pending.

Wherefore Joseph Popkin prays that the Order be reversed.

Louis Jersawit, Attorney for Joseph Popkin, Petitioner. Office & P. O. address: 150 Broadway, New York City.

Sir: Please take notice that the foregoing is a true copy of an Assignment of Errors duly filed in the office of the Clerk of the United States District Court, Southern District of New York, on the 21st day of March, 1931.

Dated New York, March 21, 1931.

Yours, etc., Louis Jersawit, Attorney for Joseph Popkin, Petitioner. Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

To Leo J. Linder, Attorney for D. Ginsberg & Sons, Inc., Creditor, 67 Wall Street, New York City.

[fol. 70] In United States District Court, Southern District of New York

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May —, 1931.

Louis Jersawit, Attorney for Appellant. Leo J. Linder, Attorney for Appellee.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

ORDER ALLOWING APPEAL—April 27, 1931

A motion having been made herein by counsel, for the appellant for leave to appeal from a certain order of the District Court dated February 21, 1931,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

Before Manton, Swan, and Chase, Circuit Judges

Appeal from the District Court for the Southern District of New York. A creditor, D. Ginsberg & Sons, Inc., obtained a writ of ne exeat against Joseph Popkin, president of the bankrupt corporation. Later an application was made to vacate the writ and the motion was denied. Joseph Popkin appeals. Order reversed.

Louis Jersawit, Esq., Attorney for Appellant.

Leo J. Linder, Esq., Attorney for Creditor-Appellee and Trustee in Bankruptcy, Intervenor.

OPINION

MANTON, Circuit Judge:

The appellee is a creditor of the bankrupt, which was adjudicated such on failure to answer a petition filed against

it on September 23, 1929, in the Eastern District of New York. The trustee qualified June 30th, 1930. Appellee, on [fol. 74] January 27, 1930, procured an order in the Eastern District of New York, for the arrest of the appellant, president of the bankrupt. The order of arrest was based on a petition of Mr. Linder, appellee's attorney, and the affidavit of one Satloff. On December 4, 1930, on the sole petition of the appellee, the bankrupt's trustee not joining therein, a district judge in the Eastern District of New York authorized and empowered the appellee

"To apply to the United States District Court for the Southern District of New York and for the District of New Jersey, and for an ancillary order of examination of such witnesses within the jurisdiction of said courts as may be necessary as to the acts, conduct or property of the bankrupt corporation herein, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey."

On the same day, appellee on its sole petition, without the trustee joining therein, obtained ex parte, in the Southern District of New York, an ancillary order ne exeat, and an ancillary order for the examination of the appellant before a Special Commissioner in bankruptcy was signed. It was therein ordered

"That the United States Marshal for the Southern District of New York, or any of his deputies, be and he is hereby commanded that, without delay, he apprehend and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination or, at his option, cause him to give sufficient bail or security in the sum of $10,000 to be approved by this [fol. 75] Court or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this Court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the Court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditor of the said bankrupt."

A warrant of arrest was executed by the Marshal in the Southern District and the appellant taken into custody.

Appellant furnished the required bail and moved to vacate the ancillary order ne exeat. From an order denying this motion, this appeal is taken.

It is conceded that the order ne exeat was made pursuant to such authority as is found in § 2, sub. div. 15 of the Bankruptcy Act. It provides:

"That the Courts of bankruptcy * * * are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (15) make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

Neither the court of primary jurisdiction nor the court below of ancillary jurisdiction, has authority to issue such an order unless it be so pursuant to § 9, sub. div. B of the Bankruptcy Act. A writ obtained under § 9, sub. div. B of the Bankruptcy Act requires a petition against a person to be obtained before the expiration of one month after the qualification of the trustee upon satisfactory proof by affi- [fol. 76] davits of at least two persons, that the bankrupt is about to leave the district in which he resides or has his principal place of business and is attempting, by his departure, to avoid examination and defeat the proceedings in bankruptcy. The section also provides for the arrest of the bankrupt and holding under bail for his appearance and examination.

No attempt was made by the appellee to comply with § 9, sub. div. B, and the appellee rests its contention as to the validity of the order on § 2, sub. div. 15, giving authority to the district courts to make such orders, issue such process and enter such judgments provided for and necessary for the enforcement of the provisions of the Bankruptcy Act.

The writ and use of the writ of ne exeat is referred to and limited by § 261 of the Judicial Code in equity proceedings, where it is provided that it may be granted by a judge, "but no writ of ne exeat shall be granted unless a suit in equity in commenced, and satisfactory proof is made the court or judge granting the same that the defendant designs quickly to depart from the United States."

Limitations for permitting such an arrest are made clear by the statute. If the bankrupt is to be taken into custody he may be detained only ten days and he must be arrested upon an order based upon the affidavits of two persons which must show the facts, not opinions, and must be reasonably conclusive. The bankrupt cannot actually be imprisoned within these limitations (Collier on Bankruptcy, [fol. 77] 13th Edition, Vol. 1, p. 390). The writ is punitive in its effect and Congress recognized, by § 9, sub. Div. B of the Act, the high degree of proof necessary upon which to base such a writ. It is to be issued only as an order of arrest with the care that Congress intended. The general authority to issue orders contained in § 2, sub. div. 15, cannot be regarded as extending a writ so specifically granted, to a district judge. The only other statutory authority to issue the writ is § 261 of the Judicial Code which applies to suits in equity and the writ can only be issued against a party defendant.

This writ is intended to be issued against the bankrupt only (In re Hale, Federal Cases, 5911). In the Hale case, Judge Choate said:

"It can hardly be doubted that so great a power, practically reviving imprisonment for debt, and touching so seriously the personal liberty of a very large class of citizens, would, if intended to be given, have been given expressly and not left to be inferred merely from the grant of other powers, and that, if given, its exercise would have been carefully limited by the Act to prevent hardships and abuse. The express grant of the power in one case shows that the attention of the framers of the law was called to the subject, and they are silent as to all other cases. This raises a presumption of some strength against the existence of the power in other cases * * *. And the fact that no provision has been made * * * for a warrant of arrest in any other case than that expressly provided for in the Act indicates the opinion of the Supreme Court that no such remedy is available."

[fol. 78] (See In re Hassenbusch, 108 Fed. 35.)

In the court below, In re Lipke (98 Fed. 970) was referred to, but the question there presented was whether a bankrupt, about to abscond with the assets, can be detained

by a writ, and under the general power of § 2, sub. div. 15, it was ruled that he could, Judge Brown said:

"The necessity of the occasional exercise of this power for the efficient administration of the Bankruptcy Law is evident. Without it the bankrupt might easily defy and largely nullify all adverse proceedings against him by absconding with his assets."

In re Cohen (136 Fed. 999) and the Matter of Berkowitz (173 Fed. 1012) to which our attention is also called, both district court cases, we think disregard the limitations of § 9, sub. div. B, and erroneously hold the power did exist to issue the writ of ne exeat under § 2, sub. div. 15. However, in both instances, the writ was against the bankrupt. We think it better to follow the apparent intent of Congress to permit the writ to issue when and as specifically granted under § 9, sub. div. B, and when the terms of that section are complied with.

Moreover, there is no provision in § 9 sub. div. B, which vested jurisdiction or authority in the court below to issue a writ of ne exeat against an officer of a bankrupt corporation. And there is no inherent power to issue such an order and thus hold him to be examined concerning the acts of the bankrupt. Congress by the general provision of § 2, sub. div. 15, did not intend the issuance of orders of arrest, for, at the same time, by § 9B, it provided specific requirements before arrests might be granted. An officer of a bankrupt corporation is not the bankrupt (Kaufman [fol. 79] v. United States, 212 Fed. 613). The section is without application to him. Congress recognized this in prescribing punishment for crime (§ 29b) under the Bankruptcy Act. Such a drastic remedy as an arrest provided for by § 9(b) of the Bankruptcy Act is one directed against the liberty of a person and should be strictly construed and carefully applied (In re Schenkein, 113 Fed. 421). It is the bankrupt, not an officer, who is referred to as subject to arrest in § 9(b). It was intended to be issued only against the bankrupt, not a third party. If an officer of the corporation fails to appear for examination under § 21(a) of the Act, or becomes a recalcitrant witness, he may be punished for contempt. This remedy is ample; at least it is all Congress has provided.

Another sufficient reason why the order was improperly granted below is the fact that it was applied for a by creditor and not the trustee in bankruptcy. (In re Lewensohn, 121 Fed. 538 [C. C. A. 2].) There the court said:

"The trustee represents every creditor * * *. If the trustee should, without sufficient reason, refuse to proceed, the Court, by its order, could compel him to do so, or remove him for disobedience. It has been held under the present Act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that the trustee is the only party who can do so."

See, also, In re Rogers Johnson Bldg. Co. (30 Fed. [2d] [fols. 80 & 80½] 359). While the trustee is serving as such, any controversy arising out of and connected with the bankrupt's estate must be instituted by the trustee, for no useful purpose can be served by a creditor's duplication. Any other interpretation of the act would leave the bankrupt at the mercy of every creditor for his real or fancied wrongs. The creditor cannot usurp the power conferred upon the trustee while the trustee is in office.

Order reversed and motion to vacate granted.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

JUDGMENT—Filed July 1, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court

be, and it hereby is, reversed, with costs and the court below directed to grant the motion to vacate.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,243. U. S. Circuit Court of Appeals, Second Circuit. Term No. 429. D. Ginsberg & Sons, Inc., petitioner, vs. Joseph Popkin. Petition for a writ of certiorari and exhibit thereto. Filed October 1, 1931. File No. 36,243.

FILE COPY

Office Supreme Cou
FILED
OCT 1 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM 1931.

No. 429

IN THE MATTER

of

FOSTER CONSTRUCTION CORPORATION,

Bankrupt,

JOSEPH POPKIN,

Respondent,

D. GINSBERG & SONS, INC.,
(Creditor),

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF THEREOF.

RAYMOND J. MAWHINNEY,
Counsel for Petitioner.

PRESS OF FREMONT PAYNE, INC., 80 WASHINGTON STREET, N. Y.

INDEX

PAGE

Petition Presents Three Questions:

First Question 2

Second Question 4

Third Question 5

Certificate of Counsel 7

BRIEF:

I—Under a proper construction of Section 2, subdivision (15) of the Bankruptcy Act the District Courts are authorized to issue a writ of ne exeat 7

II—Under a proper construction of Section 2, subdivision (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations 9

III—Under a proper construction of the powers of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, the District Court has power to issue a writ of ne exeat on the application of a creditor 11

Conclusion 12

Appendix 13

Table of Cases

	PAGE
In Re Basch, 97 Fed. 761	9
In re Berkowitz, 173 Fed. 1012	6
In Re Cohen, 136 Fed. 999	6
In Re Hale, Federal Cases No. 5911; 11 Federal Cases, page 180	9
In Re Jersey Island Packing Co., 138 Fed. 625	9
In Re Lewensohn, 121 Fed. 538	11
In Re Lipke, et al., 98 Fed. 970	7
In Re Russell, et al., 101 Fed. 248	5
O'Connor v. Virginia Passenger & Power Co., et al., 184 N. Y. 46	5, 12
White, et al. v. Schloerb, et al., 178 U. S. 542	49

The opinions below have been reported in 47 Fed. (2nd) 276 and 50 Fed. (2nd) 693.

The Jurisdiction of this court is invoked under Section 240 (2) of the Judicial Code as amended by the act of February 13, 1925 (28 U. S. C. A. 347).

IN THE

Supreme Court of the United States

OCTOBER TERM 1931.

No.

In the Matter
of
FOSTER CONSTRUCTION CORPORATION,
Bankrupt,
JOSEPH POPKIN,
Respondent,
D. GINSBERG & SONS, INC.,
(Creditor)
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition presents three important question of bankruptcy law which have not been and should be settled by this court in a case regarded by the District Court as

one of novel impression (R., 61), and involves a question of substance relating to the construction of the authority of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, and which has not been and which should be settled by this court.

The three questions are:

(1) Has the District Court power to issue a writ of ne exeat under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act, when compliance with the provisions of Section 9, subdivision (b) of the Bankruptcy Act is impossible?

(2) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act to issue a writ of ne exeat against an officer of a bankrupt corporation?

(3) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act to issue a writ of ne exeat on the application of a creditor where it appears that demand upon the trustee to make such application would have been unavailing?

As to the First Question.

In the case at bar the Circuit Court of Appeals for the Second Circuit reversed the decision of the District Court and vacated an order for the arrest and detention of the respondent which had been issued by the District Court on the application of the petitioner here, a creditor of the bankrupt corporation, who presented proof that the immediate examination of the respondent was indispensably necessary and that the respondent was about to leave the jurisdiction for the purpose of avoiding such examination. The Circuit Court held that such order could only be made pursuant to the provisions of Section 9, subdivision (b) of the Bankruptcy Act, which provided for the arrest and

detention of bankrupts who were about to leave the jurisdiction to avoid examination, and that this section had not been complied with by the petitioner here. The petitioner here, however, did not apply for the writ under Section 9, subdivision (b) but made its application under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act. The Circuit Court held, however, that Congress having specifically authorized the making of such orders by the provisions of Section 9, subdivision (b), therefore, the general authority to issue such orders contained in Section 2, subdivision (15) of the Bankruptcy Act, "cannot be regarded as extending a power so specifically granted" (R., 77).

This holding, it is submitted, is probably a misconstruction of the omnibus provisions of Section 2, subdivision (15) by which Congress invested the district courts with power "to make such orders, issue such process, *in addition* to those specifically provided, which may be necessary for the enforcement of the provisions of this act." To limit the additive clause to the narrow confines of the specific grants is to ignore not only the very language of the omnibus clause but its manifest purpose.

Congress clearly intended by this section to give the district courts power to "issue such process as may be necessary for the enforcement of the provisions of the Bankruptcy Act", in exigencies to which the specific grants of power did not apply. Proof was made in the case at bar that the issuance of an order of arrest was necessary for the enforcement of the provisions of the Bankruptcy Act, providing for the examination of persons concerning the acts, conduct and property of the bankrupt, for the record discloses that the respondent, president of the bankrupt corporation, had appropriated over $100,000.00 in cash of the corporate assets, and had left the United States with this money, that since his return to this country he had disobeyed the order

and subpoena of the District Court for his examination, had for fifteen months avoided examination, and made impossible the service of process in contempt proceedings upon him and was about to leave the jurisdiction for the purpose of avoiding examination (R., 10, 27/29, 30/34). Furthermore, it was clear upon the face of the papers submitted on the application for the writ ne exeat that compliance with Section 9, subdivision (b) was impossible since the time limitation fixed by that section had expired, and therefore a situation was presented which was not covered by any specific grant contained in the other provisions of the Bankruptcy Act.

As to the Second Question.

The Circuit Court of Appeals in the case at bar held that the District Court is without power to issue a writ ne exeat against the respondent, an officer of the bankrupt corporation. The Circuit Court held that the only statutory authority for the issuance of such a writ is provided by Section 9, subdivision (b) of the Bankruptcy Act, which refers only to the "bankrupt", and Section 261 of the Judicial Code, which refers only to a "party", and that an officer of the bankrupt corporation was neither the "bankrupt" nor a "party."

This holding, it is submitted, is a misconstruction of the powers of the Bankruptcy court under Section 2, subdivision (15) of the Bankruptcy Act, and is in conflict with the applicable decisions of this court, for:

(a) The District Court is authorized under Section 2, subdivision (15) to issue orders imposing restraints upon third parties not bankrupts where such restraints are necessary for the enforcement of the provisions of the Bankruptcy Act. *White* v. *Schloerb*, 178 U. S. 542; *In re Jersey Island Packing Co.*, 138 Fed. 625.

(b) Since the court's power flows from Section 2, subdivision (15) the provisions of the Revised Statutes, Section 717, are irrelevant and impose no restriction on such power. *In re Russell*, et al., 101 Fed. 248.

(c) For the purpose of submitting to examination, the officers of the bankrupt corporation are the "bankrupt" and, therefore, for the purpose of being detained within the jurisdiction and being restrained from leaving the jurisdiction to avoid examination, the officers of the bankrupt corporation should be regarded as the "bankrupt."

As to the Third Question.

The Circuit Court of Appeals held that the writ of ne exeat was improperly granted because applied for by a creditor, and not by the trustee. This holding, it is submitted, is probably untenable and in conflict with the weight of authority for

(a) the powers of the court to make any orders necessary for the enforcement of the provisions of the Bankruptcy Act under Section 2, subdivision (15) are without limitation as to the party at whose application the order is made; (b) a creditor is authorized under Section 21, subdivision (a) of the Bankruptcy Act to procure the examination of persons in bankruptcy; and (c) it is well settled law that a cestui que trust need not show a refusal by a trustee to act after request made of him to act, as a condition precedent to any right of action, where proof is made that a demand would be unavailing. *O'Connor* v. *Virginia Passenger & Power Co., et al.*, 184 N. Y. 46.

In the instant case proof was made that the trustee represented interests adverse to the creditors, would not act, and that it would have endangered the interests of

creditors to have even notified the trustee of the proposed effort to apprehend and detain the officer involved (R., 12, 34/35).

The questions here presented are of great importance and wide interest. Under the conditions of present-day technology and finance, modern business is predominantly conducted by corporations, and corporate bankruptcies involve enormous liabilities to creditors. The Circuit Court of Appeals for the Second Circuit in the instant case has held that the District Court is without power to issue a writ of ne exeat against an officer of a bankrupt corporation, and is without power to prevent him from leaving the jurisdiction for the purpose of avoiding examination, no matter how necessary such examination is for the enforcement of the Bankruptcy Act in the particular case. The decision of the Circuit Court of Appeals in the case at bar is the sole Circuit Court declaration on the subject. There are three District Court opinions which have heretofore considered the subject, but all involve individual bankrupts. *In re Lipke,* 98 Fed. 970; *In re Cohen,* 136 Fed. 999; *In re Berkowitz,* 173 Fed. 1012. Their dicta to the effect that Section 2, subdivision (15) is sufficient authority for the issuance of a writ of ne exeat has been overruled as erroneous by the Circuit Court of Appeals in the case at bar.

WHEREFORE, your petitioner, being without other effective remedy, prays that a writ of certiorari under Section 240, subdivision (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347) be issued out of and under the seal of this Honorable court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and all the proceedings of the

said Circuit Court of Appeals in the said case, entitled "Matter of Foster Construction Corporation, Bankrupt, Joseph Popkin, Appellant," to the end that the said case may be reviewed and determined by this court, and that said judgment of the Circuit Court of Appeals in the said case may be revised and reversed, and that your petitioner may have such other and further relief in the premises as to this court may seem just; and thus your petitioner will ever pray.

D. GINSBERG & SONS, INC.,
By RAYMOND J. MAWHINNEY,
Counsel for D. Ginsberg & Sons, Inc.

I respectfully hereby certify that in my opinion the foregoing is well founded in point of law. It is not filed for delay.

RAYMOND J. MAWHINNEY,
Counsel for Petitioner.

BRIEF

I.

Under a proper construction of Section 2, subdivision (15) of the Bankruptcy Act the District Courts are authorized to issue a writ of ne exeat.

By the provisions of Section 9, subdivision (b) of the Bankruptcy Act, Congress authorized the arrest and detention of bankrupts, but provided that the application must be made before the expiration of one month after the qualification of the trustee, and that the detention could only be had for a period of ten days. These limitations compelled the District Court, *In re Lipke,* to conclude that "considering the manifest insufficiency of Section 9 (b) to secure the effective administration of the act, I cannot doubt it was intended by Section 2, subdivision (15) to authorize the court to make all orders and issue any process necessary." *In re Lipke,* 98 Fed. 970.

Since by the very terms of the omnibus clause in Section 2, subdivision (15) of the Bankruptcy Act Congress *added* general powers to the powers specifically granted, these general powers should be exercised in cases to which such specific grants of power as are provided by Section 9, subdivision (b) do not apply. Thus, Section 11 of the Bankruptcy Act authorizes the District Courts to stay proceedings in suits commenced before the petition in bankruptcy is filed. The courts have unhesitatingly referred to the reservoir of power provided in Section 2, subdivision (15) of the Bankruptcy Act for authority to stay suits commenced *after* the petition is filed, "since the stay of suits against the bankrupt is absolutely necessary to give effect to

the Bankruptcy Act." *In re Basch,* 97 Fed. 761. The expeditious examination of officers of the bankrupt corporation, particularly the examination of an officer who has appropriated its funds, is not less absolutely necessary to give effect to the Bankruptcy Act.

The facts in the case at bar present a particularly arresting state of facts justifying the issuance of the writ herein. As the District Court in the case at bar stated:

> "Certainly the order here complained of is necessary under the circumstances here alleged—of which the truth is not challenged—in order to enforce the provisions of the Bankruptcy Act in connection with this bankrupt's estate" (R. 63).

II.

Under a proper construction of Section 2, subdivision (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations.

The holding of the Circuit Court of Appeals in the case at bar that a writ of ne exeat is not issuable against an officer of a bankrupt corporation ignores the latitude of the power vested by Congress in the District Court by the omnibus provisions of Section 2, subdivision (15). The power to issue orders necessary for the enforcement of the Bankruptcy Act is not limited to bankrupts. It is under this very section that District Courts have issued orders imposing restraints on third parties not bankrupts. Thus, in *White* v. *Schloerb,* 178 U. S. 542, this court held that under said Section 2, subdivision (15) the District Courts could compel persons to restore property to the estate of bankrupts. In *In re Jersey Island Packing Co.,* 138 Fed. 625, the court directed the restraint not only of

the bankrupt but of any other party from making any transfer or disposition of the debtor's property. Section 2, subdivision (15) contains no limitation whatsoever as to the party against whom such an order is issuable.

It is of the greatest importance that in corporate bankruptcies the individuals who are the officers of bankrupt corporations should be subject to such process as is provided by the writ ne exeat. Corporations act necessarily by and through individuals. Unquestionably, the fiction of corporate entity and the distinction between the corporation as an entity and the human beings who are interested in it, is an essential one for a variety of purposes. But where it would stultify logic and work an obvious circumvention of justice to insist upon the distinction and to fail to recognize the fact that the activities of the corporation are the activities of human beings in behalf of the corporation, the courts have been quick to look to the natural persons, and to direct their commands and prohibitions to them directly.

Section 7, subdivision (9) of the Bankruptcy Act requires the bankrupt to "submit to examination." It must be clear that, for the effective administration of the Bankruptcy Act, in so far as the corporate bankrupts are concerned, these duties must be regarded as the duties of the natural persons "in esse", who have had the conduct and management of the corporation's business in their hands.

It is submitted that the power of the court to compel obedience to its orders by officers of a bankrupt corporation is a necessary incident to the general power of the court of bankruptcy granted it under Section 2, subdivision (15) to make any orders necessary for the effective administration of the Bankruptcy Act.

The District Court in the case at bar was, indeed, fully persuaded that "if this court did not have the

power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy law with impunity" (R., 63).

III.

Under a proper construction of the powers of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, the District Court has power to issue a writ of ne exeat on the application of a creditor.

The Circuit Court of Appeals in the case at bar held that the order was improperly granted below because it was applied for by a creditor and not by the trustee, citing *In re Lewensohn,* 121 Fed. 538. That case was concerned with the right of a creditor to appeal from an allowance of the claim of another creditor. It presents facts in no way analogous to the situation presented in the case at bar.

Section 2, subdivision (15) of the Bankruptcy Act, which invests the court with the power to make "any orders or issue any process necessary for the enforcement of the provisions of the Bankruptcy Act", does not limit the power of the court to cases where the application for the exercise of the power is made by a trustee in bankruptcy. Section 21, subdivision A of the Bankruptcy Act, indeed, provides that "a court of bankruptcy may, upon the application of any officer, bankrupt, or *creditor,* by order require any designated person to appear in court to be examined concerning the acts, conduct and property of the bankrupt." (Italics ours.)

In the instant case, a creditor of the bankrupt who had filed its claim, had applied for and procured an order directing the examination of the appellant, and had then applied for and procured the writ of ne exeat. Since the court had authority to make the order direct-

ing the examination of the respondent at the instance of a creditor, then, under Section 2, subdivision (15) it had the general power to make any order at the instance of a creditor necessary for the enforcement of its order directing the examination of the respondent.

Furthermore, the facts here disclosed would clearly justify the granting of the order at the instance of the creditor, instead of the trustee in bankruptcy. The facts presented to the court below made it entirely clear that any request by creditors addressed to the trustee in bankruptcy to act against the respondent would not only have been futile but would have been prejudicial to the interests of creditors, for the trustee represented interests adverse to the creditors, had formerly been the respondent's attorney and sustained such relations with the respondent that it would even have endangered the interests of creditors to have notified him of the application (R., 11-12, 34-5, 43-4).

Courts of equity which have forbidden cestuis que trust from taking action unless the trustee refuses to act, have recognized the rule of equity that the request need not be made if it would be futile, if, e. g., the trustee by his conduct had made it clear that he would not act if requested. *O'Connor* v. *Virginia Passenger and Power Co., et al.*, 184 N. Y. 46.

CONCLUSION.

The vital importance of the questions here presented and the absence of final authoritative construction by this Court of the sections of the Bankruptcy Act involved merit the granting of the writ here applied for.

Respectfully submitted,

RAYMOND J. MAWHINNEY.

APPENDIX

(BANKRUPTCY ACT OF 1898, AND ITS AMENDMENTS.)

SECTION 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

SECTION 7, SUBDIVISION a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

SECTION 9, SUBDIVISION b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustees, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has

his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SECTION 21, SUBDIVISION a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *

FILE COPY

JAN 18 19

No. 429

In the Supreme Court of the United States

OCTOBER TERM, 1931

D. GINSBERG & SONS, INC., PETITIONER

v.

JOSEPH POPKIN

(Matter of Foster Construction Corporation, Bankrupt)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

LEO J. LINDER
Attorney for Petitioner

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Specification of errors to be urged	6
Summary of argument	6
Argument:	
I. The District Courts have power to issue orders of arrest under the omnibus provisions of Section 2, sub-division (15) of the Bankruptcy Act	8
II. Under a proper construction of Section 2, sub-division (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations	11
III. Under a proper construction of the powers of the District Court under Section 2, sub-division (15) of the Bankruptcy Act, the District Court has power to make an order of arrest on the application of a creditor	14
Conclusion	16
Appendix	17

CITATIONS

Cases:

Alphin & Lake Cotton Co., 131 Fed. 824, 825, 826	13
Basch, In Re, 97 Fed. 761	9
Berkowitz, In Re, 173 Fed. 1012	10
Cantelo Mfg. Co., In Re, 185 Fed. 276	13
Cohen, In Re, 136 Fed. 999	10

Page

Fixen & Co.; In Re, 96 Fed. 748, 52 13
Hale, In Re, Fed. Cas. 5911 10
Hassenbusch, In Re, 108 Fed. 35 10
Hoffschlaeger Co. v. *Young Nap*, 12 A. B. R. 510, 2 Haw. Dist. 90 10
Horgan & Slattery, 98 Fed. 414, 415, 416 13
Jersey Island Packing Co., 138 Fed. 625 12
Lewensohn, In Re, 121 Fed. 538 14
Lipke, In Re, 98 Fed. 970 10
Muncie Pulp Co., In Re, 139 Fed. 546 13
O'Connor v. *Virginia Passenger and Power Co.*, 184 N. Y. 46 16
Rogers Johnson Bldg. Co., 30 Fed. (2d) 353 14
Royce Dry Goods Co., 133 Fed. 100, 106 13
Russell, In Re, 101 Fed. 248 12
White v. *Schloerb*, 178 U. S. 542 11

Statutes:

Bankruptcy Act, Sec. 2 (15) 17, 2, 6-12, 14, 15
Sec. 7 (a) 17, 13
Sec. 9 (b) 17, 6, 7, 8, 9, 10
Sec. 11 9
Sec. 21 (a) 17, 15

Judicial Code, Sec. 261 12

Texts:

Remington on Bankruptcy (3rd ed.), Sec. 426, 542, pp. 1977, 2384; Sec. 3009 ..... 10, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 429

D. GINSBERG & SONS, INC., PETITIONER,

v.

JOSEPH POPKIN

(Matter of Foster Construction Corporation, Bankrupt)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 38) is reported in 50 F. (2d) 693. The opinion of the District Court for the Southern District of New York (R. 29) is reported in 47 F. (2d) 276.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered July 1, 1931 (R. 43). The petition for writ of certiorari was filed October 1, 1931, and was granted November 2, 1931 (R. 44). The jurisdiction of this court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

(1) Has the District Court power to make an order of arrest under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act, when compliance with the provisions of Section 9, subdivision (b) of the Bankruptcy Act is impossible?

(2) Has the District Court power under Section 2, subdivision (15) of the Bankruptcy Act to make an order for the arrest and detention of an officer of a bankrupt corporation?

(3) Has the District Court power under said Section 2, subdivision (15) of the Bankruptcy Act, to make an order of arrest on the application of a creditor where it appears that demand upon the Trustee in Bankruptcy to make such application would have been unavailing?

Statutes Involved

The applicable statutes appear in the Appendix, *infra*, pages 17, 18.

Statement

On September 23, 1929, an involuntary petition in bankruptcy was filed against Foster Construction Corporation in the United States District Court for the Eastern District of New York, and thereafter said corporation was duly adjudicated a bankrupt (R. 5). The Respondent, Joseph Popkin, is the president of the bankrupt corporation (R. 5). On December 4, 1930, upon the application of the Petitioner, the District Court for the Southern District of New York granted an ancillary order directing the United States Marshall to take the Respondent into custody, and bring him before the court for examination, or, at his option, cause him to give bail in the sum of $10,000.00, that he would not go beyond the territorial jurisdiction of the court without its leave (R. 4, 8). The Respondent was taken into custody under this order, and was released on furnishing bail (R. 9). The Respondent then moved to vacate the order for his arrest, and this motion was denied (R. 29). On appeal to the Circuit Court of Appeals for the Second Circuit, that court reversed and granted the motion to vacate the order of arrest (R. 43).

The Respondent's motion to vacate was based solely on jurisdictional grounds (R. 3). The facts stated in the papers, upon which the writ directed to the United States Marshal was granted (R. 8), are not controverted by any statement appearing in the Transcript of Record. The facts, stated in the papers, are:

Prior to the filing of the petition in bankruptcy against the bankrupt corporation, and in March and April 1929, the

Respondent signed checks of the bankrupt corporation, as its President, for amounts aggregating $100,000., cashed these checks and fled to Canada (R. 5, 20). He remained out of the jurisdiction of the United States until such time as he believed that the creditors of the bankrupt corporation had been placated (R. 6). After the petition in bankruptcy was filed, and in January 1930, a creditor of the bankrupt corporation obtained an order directing the Respondent to appear before a Special Commissioner for examination under Section 21 (a) of the Bankruptcy Act, and the Respondent was duly served with a subpoena (R. 15). He failed to appear (R. 15). His attorney, notified of his default, wrote counsel for the creditor stating that he "had arranged with" the Respondent to appear for examination (R. 15, 24). After this letter was written, the respondent again fled the jurisdiction (R. 15). The Special Commissioner thereafter certified the Respondent for contempt of court (R. 15). Orders to show cause were made by the District Court, directing the Respondent to show cause why he should not be punished for contempt, but, despite diligent efforts to serve these orders to show cause, the Respondent could not be found (R. 15, 24, 27).

On January 27, 1930, on a petition setting forth the foregoing facts (R. 22), a writ was issued by the District Court for the Eastern District of New York, directing the United States Marshal to take the Respondent into custody, and bring him before the court for examination (R. 21). The United States Marshal for the Eastern District never succeeded in finding the Respondent (R. 16).

Ten months later, on December 3, 1930, the District Court for the Eastern District of New York issued a second writ

directing the arrest and detention of the Respondent (R. 13) on the application of the Petitioner setting forth all of the foregoing facts, and alleging further that, during the intervening ten months, creditors had scoured the country in an effort to find the Respondent, and, finally, that the Petitioner had just discovered that the Respondent, apparently satisfied that everything had blown over, had once again ventured to return to New York (R. 14-21). Later, the same court made an order authorizing the Petitioner to apply for ancillary orders of arrest to other courts (R. 10). On December 4, 1930, the District Court for the Southern District of New York granted the ancillary order of arrest (R. 8), under which the Respondent was arrested. It was this order which the District Court sustained on the Respondent's motion to quash and which the Circuit Court of Appeals, on appeal, vacated.

The order of arrest was procured by the Petitioner, a creditor, and not by the Trustee in Bankruptcy who had been appointed in June 1930. The papers on which the order of arrest was made, contained statements showing that the Trustee represented interests adverse to the creditors, had formerly been the Respondent's attorney, that he was friendly with the Respondent, and that it would have endangered the interests of creditors to have even notified the Trustee of the application (R. 6, 19). This Trustee subsequently resigned, and the successor-trustee intervened in the Circuit Court of Appeals and appeared in that Court in support of the order of arrest (R. 38).

Specification of Errors to be Urged

The Court below erred:

1. In holding that the District Court is without power to issue an order of arrest under the omnibus provisions of Section 2 (15) of the Bankruptcy Act, and in limiting the power to issue such a writ to cases falling within Section 9 (b) of the Bankruptcy Act.

2. In holding that the District Court is without power to issue an order of arrest against an officer of a bankrupt corporation.

3. In holding that an order of arrest was improperly granted on the application of a creditor.

Summary of Argument

1. The power of the Bankruptcy Court to issue an order of arrest is not limited to Section 9 (b) of the Bankruptcy Act, but exists under Section 2 (15) of that Act, for:

> (a) The provisions of the omnibus clause in Section 2 (15) are supplementary and a limitation of the powers of the Court to Section 9 (b) ignores the obvious purpose, as well as the explicit provisions, of the omnibus clause.
>
> (b) The supplementary powers granted by the omnibus clause should be invoked "wherever necessary for the enforcement of the Bankruptcy Act", and in all cases to which the provisions of Section 9 (b) are inapplicable.

2. The District Court is authorized, under Section 2 (15) of the Bankruptcy Act to issue orders directing the arrest and detention of an officer of a bankrupt corporation, for:

(a) The District Court is authorized under Section 2, subdivision (15) to issue orders imposing restraints upon third parties not bankrupts where such restraints are necessary for the enforcement of the provisions of the Bankruptcy Act.

(b) Since the court's power flows from Section 2, subdivision (15), the limitations in Section 9 (b), which may be regarded as arising from the use of the word "bankrupt" in Section 9 (b), are irrelevant and impose no restriction on such power.

(c) Since the court's power flows from the Bankruptcy Act the provisions of the Judicial Code, Section 261, are irrelevant and impose no restriction on such power.

(d) For the purpose of submitting to examination, the officers of the bankrupt corporation are the "bankrupt" and, therefore, for the purpose of being detained within the jurisdiction and being restrained from leaving the jurisdiction to avoid examination, the officers of the bankrupt corporation should be regarded as the "bankrupt".

3. The District Court is authorized, under Section 2(15), to issue an order of arrest on the application of a creditor, upon proof that demand upon the Trustee in Bankruptcy, then in office, to make such application, would be unavailing, for:

(a) The powers of the court to make any orders necessary for the enforcement of the provisions of

the Bankruptcy Act under Section 2, subdivision (15) are without limitation as to the party upon whose application the order is made.

(b) A creditor is authorized under Section 21, subdivision (a) of the Bankruptcy Act to procure the examination of persons in bankruptcy; and

(c) It is well settled law that a *cestui que* trust need not show a refusal by a trustee to act after request made of him to act, as a condition precedent to any right of action, where proof is made that a demand would be unavailing.

ARGUMENT

I

The District Courts have power to issue orders of arrest under the omnibus provisions of Section 2, subdivision (15) of the Bankruptcy Act.

In the case at bar, the Circuit Court below held that an order of arrest, such as the one issued here, could only be made pursuant to Section 9 (b) of the Bankruptcy Act, which specifically provides for the arrest and detention of bankrupts, and that the order must be vacated because it was not authorized by that section. The Court held further that general authority to issue orders under Section 2 (15) of the Bankruptcy Act "cannot be regarded as extending a power so specifically granted" (R. 41).

This holding ignores not only the very language of the omnibus clause in Section 2 (15), but the manifest purpose of that section, for thereby Congress invested the

District Courts with "power to make such orders • • • *in addition* to those specifically provided, which may be necessary for the enforcement of the provisions of the Bankruptcy Act." (Italics ours.) Since, by the explicit terms of this omnibus clause, Congress *added* general powers to the powers specifically granted by the other provisions of the Bankruptcy Act, these general powers must be deemed to extend to all cases to which such specific grants of power as are provided by Section 9 (b) do not apply, and in which, nevertheless, the exercise of the power is "necessary for the enforcement of the provisions of the Act." Indeed, the proper construction of a statute which grants specific powers and general powers "in addition" requires that both be given effect.

This has been the construction of the purpose and effect of the omnibus clause. Thus, Section 11 of the Bankruptcy Act authorizes the District Courts to stay proceedings in suits commenced *before* the petition in bankruptcy is filed. The courts have unhesitatingly referred to the reservoir of power provided in Section 2, subdivision (15) of the Bankruptcy Act for authority to stay suits commenced *after* the petition is filed, and have not regarded their powers as limited by the express provisions of Section 11, "since the stay of suits against the bankrupt is absolutely necessary to give effect to the Bankruptcy Act." In *re Basch,* 97 Fed. 761.

In the case of orders of arrest and detention, likewise, the District Courts which have had occasion to consider the question and the text writers on the Law of Bankruptcy have concluded that "arrest and detention under Section 9 (b) is not the exclusive method" and that this power may

be exercised where "the specific provisions of Section 9 (b) of the Bankruptcy Act are inadequate," in such instance, as where the time limitations of that section have expired. In *re Lipke*, 98 Fed. 970, *Matter of Cohen*, 136 Fed. 999; *Matter of Berkowitz*, 173 Fed. 1012; *Hoffschlaeger Co.* v. *Young Nap*, 12 A. B. R. 510, 2 Haw. Dist. 90; Remington on Bankruptcy (3rd Ed.) Vol. 1, Sec. 426. By the provisions of Section 9 (b) the application for the order of arrest must be made before the expiration of one month after the qualification of the Trustee, and the detention can only be had for a period of ten days. These limitations compelled the District Court, in *re Lipke, supra,* to state that "considering the manifest insufficiency of Section 9 (b) to secure the effective administration of the act, I cannot doubt it was intended by Section 2, subdivision (15) to authorize the court to make all orders and issue any process necessary."

The cases cited in the opinion of the court below are not authority for that court's holding. In *re Hale,* Fed. Cas. 5911 (R. 41) was decided prior to the present Bankruptcy Act. In *re Hassebusch,* 108 Fed. 35 (R. 41) is authority for the rule that an order of arrest may only be issued against "one at the time within the jurisdiction of the court."

In the case at bar the court issuing the writ had satisfactory proof before it (1) that the party to be arrested had disobeyed the orders of the court for his examination, had successfully avoided examination during the fifteen months which had elapsed since the commencement of the bankruptcy proceedings, and was now about to leave the jurisdiction to avoid examination, and (2) that his immediate

examination was necessary for the enforcement of the provisions of the Act, since he was the president of the bankrupt corporation and had failed to account, and had apparently absconded with $100,000 of the cash assets of the bankrupt corporation. The time limitation contained in Section 9 (b), in any event, made that section inapplicable since five months had elapsed since the election of the Trustee.

The necessity of the order of arrest for the enforcement of the provisions of the Bankruptcy Act being clear, the exercise of the court's power under Section 2 (15) was eminently justified.

II

Under a proper construction of Section 2, subdivision (15) the District Court is authorized to issue orders directing the arrest and detention of officers of bankrupt corporations.

The holding of the Circuit Court of Appeals in the case at bar that an order of arrest cannot be made against an officer of a bankrupt corporation ignores the latitude of the power vested by Congress in the District Court by the omnibus provisions of Section 2, subdivision (15). The power to issue orders necessary for the enforcement of the Bankruptcy Act is not limited to bankrupts. It is under this very section that District Courts have issued orders imposing restraints on third parties not bankrupts. Thus, in *White* v. *Schloerb*, 178 U. S. 542, this court held that under said Section 2, subdivision (15) the District

Courts could compel persons to restore property to the estate of bankrupts. In *re Jersey Island Packing Co.*, 138 Fed. 625, the court, by virtue of its powers under the very section in question, enjoined parties not bankrupts from from making any transfer or disposition of the debtor's property. Section 2, subdivision (15) contains no limitation whatsoever as to the party against whom such an order is issuable.

The court below urged that Section 9 (b) authorizes the arrest and detention of the "bankrupt" and that "an officer of a bankrupt corporation is not the bankrupt" (R. 42). Such limitations as exist in Section 9 (b) impose no restriction upon the powers granted by Section 2 (15). Indeed, it is the very limitations of Section 9 (b) which justify the reference to the supplementary powers granted by Section 2 (15).

Again, the court below urged that the order of arrest here is analogous to the historic writ *ne exeat*, the issuance of which is limited by Section 261 of the Judicial Code, which provides that a writ of *ne exeat* "can only be issued against a party defendant" (R. 40, 41). It is well settled, however, that the provisions of the Revised Statues and the Judicial Code are inapplicable to and do not limit any power conferred by the provisions of the Bankruptcy Act. Thus, in *Matter of Russell*, 101 Fed. 248, the power of the Bankruptcy Court to issue injunctions under Section 2 (15) was held not subject to the restrictions of the provisions of the Revised Statutes specifically applicable to injunctions.

Further, it is of the greatest importance that, in corporate bankruptcies, the individuals who are the officers of bankrupt corporations should be subject to such process as is provided by an order of arrest. Corporations act neces-

sarily by and through individuals. Unquestionably, the fiction of a corporate entity and the distinction between the corporation as an entity and the human beings who are interested in it, is an essential one for a variety of purposes. But where it would stultify logic and work an obvious circumvention of justice to insist upon the form and to fail to recognize the fact that the activities of the corporation are the activities of human beings acting in behalf of the corporation, the courts have been quick to look to the natural persons, and to direct their commands and prohibitions to them directly.

Section 7(a) subdivision (9) of the Bankruptcy Act requires the bankrupt to "submit to examination." It must be clear that, for the effective administration of the Bankruptcy Act, in so far as the corporate bankrupts are concerned, these duties must be regarded as the duties of the natural persons "*in esse,*" who have had the conduct and management of the corporation's business in their hands. As the District Court observed:

> "Officers of a bankrupt corporation are regarded in courts of bankruptcy as the bankrupts for many purposes which it is unnecessary to enumerate. Cf. Remington on Bankruptcy, sec. 542, pp. 1977, 2384; and see, also Remington on Bankruptcy, Sec. 3009; in Re Alphin & Lake Cotton Co., 131 Fed. 824, 825, 826; in re Fixen & Co., 96 Fed. 748, 752; in re Horgan & Slattery, 98 Fed. 414, 415, 416 (C. C. A. 2); in re Muncie Pulp Co., 139 Fed. 546, 548 (C. C. A. 2); in re Royce Dry Goods Co., 133 Fed. 100, 106; in re Cantelo Mfg. Co., 185 Fed. 276" (R. 33, 34).

It is submitted that the power of the court to compel obedience to its orders by officers of a bankrupt corporation

is a necessary incident to the general power of the court of bankruptcy granted it under Section 2, subdivision (15) to make any orders necessary for the effective administration of the Bankruptcy Act.

The District Court in the case at bar was, indeed, fully persuaded that "if this court did not have the power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy law with impunity" (R. 34).

III

Under a proper construction of the powers of the District Court under Section 2, subdivision (15) of the Bankruptcy Act, the District Court has power to make an order of arrest on the application of a creditor.

The Circuit Court of Appeals in the case at bar held that the order was improperly granted below because it was applied for by a creditor and not by the Trustee in Bankruptcy, citing *In re Lewensohn*, 121 Fed. 538, and *In re Rogers Johnson Bldg. Co.*, 30 Fed. (2d) 353. The *Lewensohn* case was concerned with the right of a creditor to appeal from an allowance of the claim of another creditor. The *Rogers* case was concerned with the right of a creditor to appeal from an order of a referee declaring a trust deed valid, where the Trustee declined to prosecute the appeal, and both the referee and the District Court, after a consideration of the facts, sustained the decision of the Trustee not to appeal. Neither case presents facts in any way analogous to the facts presented in the case at bar.

Section 2, subdivision (15) of the Bankruptcy Act, which invests the court with the power to make "any orders or issue any process necessary for the enforcement of the provisions of the Bankruptcy Act," does not limit the power of the court to cases where the application for the exercise of the power is made by a trustee in bankruptcy. Section 21, subdivision (A) of the Bankruptcy Act, indeed, provides that "a court of bankruptcy may, upon the application of any officer, bankrupt, or *creditor*, by order require any designated person to appear in court to be examined concerning the acts, conduct and *property* of the bankrupt." (Italics ours.)

In the instant case, a creditor of the bankrupt who had filed its claim, had applied for and procured an order directing the examination of the Respondent, and had then applied for and procured the order of arrest. Since the court had authority to make the order directing the examination of the Respondent at the instance of a creditor, then, under Section 2, subdivision (15) it had the general power to make any order, at the instance of a creditor, necessary for the enforcement of its order directing the examination of the Respondent.

Furthermore, the facts here disclosed would clearly justify the granting of the order at the instance of the creditor, instead of the Trustee in Bankruptcy, for they made it entirely clear that any request by creditors addressed to the Trustee in Bankruptcy to act against the Respondent would not only have been futile but would have been prejudicial to the interests of creditors (R. 11-12, 34-5, 43-4).

Courts of equity which have forbidden *cestuis que* trust from taking action unless the trustee refuses to act, have

recognized the rule of equity that the request need not be made if it would be futile, if, *e. g.*, the trustee by his conduct had made it clear that he would not act if requested. *O'Connor* v. *Virginia Passenger and Power Co., et al.*, 184 N. Y. 46.

CONCLUSION

The judgment of the Circuit Court of Appeals for the Second Circuit is erroneous and should be reversed.

LEO J. LINDER,
Attorney for Petitioner.

APPENDIX

(BANKRUPTCY ACT OF 1898, AND ITS AMENDMENTS)

SECTION 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

SECTION 7, SUBDIVISION a. The bankrupt shall * * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

SECTION 9, SUBDIVISION b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustees, upon satisfactory proof by the affidavits of

at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SECTION 21, SUBDIVISION a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *

FILE COPY

FILED
OCT 19 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

In the Matter

of

FOSTER CONSTRUCTION CORPORATION,
Bankrupt,

JOSEPH POPKIN,
Respondent,

D. GINSBERG & SONS, INC., (Creditor),
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

BRIEF FOR JOSEPH POPKIN, RESPONDENT, IN OPPOSITION.

LOUIS JERSAWIT,
Counsel for Respondent.

INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
1. No jurisdiction in bankruptcy court to issue order of arrest or writ of *ne exeat*, except under Sec. 9 (b) of the Bankruptcy Act	3
2. Order or writ of *ne exeat* is not authorized against an officer of the bankrupt corporation	3
3. Only the Trustee in bankruptcy may petition for an order or writ of *ne exeat*	3-4
Conclusion	8
Appendix	8

Citations.

Cases:	
Davidson v. *Rosenberg*, 130 Wisc. 24	6
Dick v. *Swinton*, 1 Ves. & B., 371-373	5
In Re: Hassenbusch, 108 Fed. 35	5
In Re: Hale, Fed. Cases 5911	5
Rogers Johnson Building Co., 30 Fed. (2) 359	7
Kaufman v. *U. S.*, 212 Fed. 613	6
U. S. Ex Rel Kelly v. *Peters*, 166 Fed. 613	5
In Re: Lewensohn, 121 Fed. 538	7

Text Books.

Collier on Bankruptcy, 13th Ed., page 390	5
Encyclopedia of Federal Procedure, Section 3312	5
Longsdorf Encyc. Fed. Juris., Volume 6, page 970	6
Statutes:	
Bankruptcy Act. Secs. 1 (4), 2 (15), 7 (a), 9 (b), 21 (a)	2-8
Judicial Code, Sec. 261 (28 U. S. C. A. 376)	2-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

In the Matter
of
FOSTER CONSTRUCTION CORPORATION,
Bankrupt,
JOSEPH POPKIN,
Respondent,
D. GINSBERG & SONS, INC., (Creditor),
Petitioner.

On Petition for a Writ of Certiorari to the Circuit Court of Appeals, Second Circuit.

BRIEF FOR JOSEPH POPKIN, RESPONDENT, IN OPPOSITION.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported at 50 Fed. (2) 693.

Jurisdiction.

The order sought to be reviewed was entered July 1, 1931 (R. 78). The petition for certiorari was filed on October 1, 1931. The jurisdiction of this Court is invoked under Section 240, subdivision (a) of the Judicial Code (28 U. S. C. A. 347).

Question Presented.

Whether an order for the arrest of the President of a bankrupt corporation may be issued in bankruptcy proceedings to secure the attendance of such officer for the purpose of examining him on the petition of a single creditor of the bankrupt, not supported by two affidavits, made more than six months after the qualification of the trustee, the bankrupt's trustee not joining in the petition and without attempting to comply with Section 9 (b) of the Bankruptcy Act.

Statutes Involved.

The statutes involved are Sections 1-(4), 2-(15), 7-(a), 9-(b) and 21-(a) of the Bankruptcy Act of 1898, and Section 261 of the Judicial Code. They appear in full in the appendix hereto.

Statement.

The following are the essential facts as they appear from the record:

The Foster Construction Corporation was adjudicated a bankrupt prior to July 1, 1930, on which date a Trustee was appointed and qualified (R. 3, fol. 9). The respondent Popkin was the President of the bankrupt (R. 10, fol. 29). On December 4, 1930, the petitioner D. Ginsberg & Sons, Inc., obtained an ancillary order *ne exeat* and which also ordered the examination of the respondent Popkin before a Special Commissioner in Bankruptcy, by which the United States Marshal was directed to take said Popkin into custody, etc. (R. 7). Pursuant to that order, a warrant of arrest

was executed by the Marshal and the respondent was taken into custody (R. 15). Thereupon, said Popkin made an application to vacate the order of *ne exeat* (R. 1), which application was denied by the District Court (R. 64). The Circuit Court of Appeals, Second Circuit, granted leave to appeal from said order (R. 72), and upon the appeal the Circuit Court of Appeals, Second Circuit reversed the District Court and granted the motion to vacate the ancillary order of *ne exeat* (R. 78).

The opinion of the Circuit Court of Appeals appears at R. 73.

Argument.

The only authority urged by the petitioner in any of the Courts below, in support of the order of *ne exeat*, is claimed to have been found in Sec. 2, subdivision 15 of the Bankruptcy Act quoted in the appendix. The Circuit Court of Appeals, however, upheld all three contentions of the respondent, as follows:

1. No order or writ of *ne exeat* for the arrest and detention of witnesses can be issued under Sec. 2, subdivision 15 of the Bankruptcy Act, as they may be issued only when authorized by Sec. 9, subdivision b, of that Act, and in the manner there prescribed.

2. The Bankruptcy Court was without jurisdiction to issue an order or writ of *ne exeat* against an officer of the bankrupt corporation, himself not being the bankrupt.

3. No person other than the Trustee is authorized to petition the Court for an order or writ of *ne*

exeat, and, as the Trustee did not make or join in the petition in this case, no order or writ could issue.

It is submitted that this application presents no question of conflicts between decisions in the different Circuits, as the only prior decisions are in accord and do not conflict with that in this case, nor does it involve any important question of Federal law or a departure from the usual procedure of judicial proceedings. The decision below was against the petitioner on all of the three separate distinct grounds above stated, and, unless the Court below was wrong on *all three* points, its decision must necessarily stand, and it is submitted that it cannot be seriously argued that *all three* of these points involve any important question of general law which requires decision by this Court.

A Court of bankruptcy can issue an order or writ of *ne exeat* only in the manner and under the conditions prescribed by Sec. 9 (b) of the Bankruptcy Act.

The section referred to authorizes such a writ against the bankrupt, provided the petition therefor is supported by the affidavit of at least two persons and made within 30 days after the qualification of the trustee. Petitioner's contention is that despite this express grant there is a general authority to issue such a writ in any other case deemed necessary by the Court under the omnibus provision of Sec. 2, subdivision 15 quoted in the appendix.

It is submitted, however, that this cannot be the law, as otherwise there would be no necessity whatever for Sec. 9 (b). If there is power in the Court under Sec. 2, subdivision 15 to grant a writ *at any time* against *any person* on the unsupported affidavit of *a single creditor*

(which was the situation here), what necessity would there be for Sec. 9 (b), which authorizes the writ only against the bankrupt and only if applied for within 30 days after the qualification of the trustee and when supported by at least two affidavits? The greater would obviously include the lesser and there would be no necessity for expressly authorizing the lesser.

Similarly, Section 9 (b), authorizes the writ only against a person *who resides or has his principal office in the District.* Here no evidence of this condition precedent was presented; if petitioner's contention (that the writ may issue in cases other than those specified by 9 [b]) is correct, then the writ may issue against a person *casually* in the District, who has never resided nor had his principal place of business there.

This question is not a new or novel one. It has frequently been discussed and has been determined adversely to petitioner in at least two cases.

> *In re Hassenbusch,* 108 Fed. 35;
> *U. S. ex rel. Kelly* v. *Peters,* 166 Fed. 613.

And a similar denial of authority was asserted by Judge Choate in the matter of *In re Hale,* Fed. Cases 5911, which involved, however, the Act of 1867.

See also:

> *Collier on Bankruptcy,* 13th Ed., page 390;
> *Encyclopedia of Federal Procedure,* Sec. 3312;
> *Dick* v. *Swinton,* 1 Ves. & B., 371-373.

In no event is an order of arrest or writ of *ne exeat* authorized against an officer of the bankrupt corporation.

Section 9 (b) expressly authorizes the issuance of such an order only against the bankrupt. It is well set-

tled that an officer of the bankrupt is not the bankrupt within the meaning of such a provision.

Kaufman v. *U. S.*, 212 Fed. 613.

The limitations prescribed by this Section to the bankrupt itself is in line with the limitations on the general authority of the Federal Courts to issue such writs.

Thus, Sec. 261 of the Judicial Code, which authorizes the issuance of such writs in Civil suits, expressly provides that

> "No writ of *ne exeat* shall be granted *unless a suit in equity* is *commenced* and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)

See also:

Davidson v. *Rosenberg*, 130 Wis. 24;
Longsdorf, Enc. Fed. Juris., Vol. 6, p. 970.

By the express language of this Section the authority to issue such writs is denied except in a suit in equity, and then only against *the defendant*. If the bankruptcy proceedings be deemed a suit in equity within the language of this Section, the authority of the Court would still be limited to issuing the writ against the defendant, that is, the bankrupt.

What the petitioner seeks here is judicial legislation. When the Circuit Court of Appeals held, in *Kaufman* v. *U. S.*, 212 Fed. 613, that an officer of the bankrupt is not the bankrupt within the meaning of Section 29 (b) of the Bankruptcy Act which provides for the punishment of bankrupts who conceal assets, Con-

gress corrected the omission by the Act of May 27, 1926, which expressly extended the crime to include such officer. The petitioner here is attempting to accomplish a like result by judicial decision.

There is ample other authority in the Federal Statutes by which an *officer* of a bankrupt corporation can be compelled to attend and testify. It appears in this case that the respondent was subpoenaed and failed to appear (R. 27-28). The remedy of the petitioner here was thereupon to cite him by contempt proceedings and a resort to the proceedings here attempted was not only unauthorized, but wholly unnecessary.

No person other than the trustee may petition for an order or writ of *ne exeat*.

Not only was the petition for the order or writ made by a single creditor, contrary to the provisions of Sec. 9 (b), but the Trustee did not join in the petition nor become a party thereto in any way.

During the administration of the bankrupt's estate, the creditors are represented by the Trustee who represents every creditor; if in a proper case the Trustee refuses to take action which he should take, the remedy for the creditor is to apply to the Court to compel the Trustee to take the action required, or to remove him, but not for an order authorizing the creditor to take such action *in his own name*.

This was pointed out by the Circuit Court of Appeals, Second Circuit, in the leading case of *In re Lewensohn*, 121 Fed. 538 (writ denied by this Court April 27, 1903).

See also:

Rogers Johnson Building Co., 30 Fed. (2) 359.

Conclusion.

The decision of the Court below to the effect that a creditor of a bankrupt corporation may not obtain an order or writ of *ne exeat* for the arrest of an officer of the bankrupt (not himself the bankrupt) made more than six months after the qualification of the trustee on the unsupported petition of a single creditor, in which the Trustee did not join and in which no attempt was made to comply with Sec. 9 (b), of the Bankruptcy Act, was undoubtedly correct. No question of general interest or importance is raised, and we submit that the petition should be denied.

Respectfully submitted,

LOUIS JERSAWIT,
Counsel for Respondent.

APPENDIX.

The Bankruptcy Act of 1898, as amended, (11 U. S. C. A.) provides in part as follows:

> "Sec. 1 (4) * * * 'bankrupt' shall include a person against whom an involuntary petition * * * has been filed or who has filed a voluntary petition, or who has been adjudged a bankrupt.
>
> Section 2. That the Courts of Bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the

United States Courts in the Indian Territory and the District of Alaska, are hereby made Courts of Bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Section 7, Subdivision a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

Section 9, Subdivision b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy,

issue a warrant to the marshal directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 21, Subdivision a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *"

Section 261 of the Judicial Code (28 U. S. C. A. 376) provides as follows:

"*Writs of ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any District Judge, in cases where they might be granted by the District Court of which he is a Judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)

FILE COPY

FILED
JAN 23
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

D. GINSBERG & SONS, INC.,

Petitioner,

—against—

JOSEPH POPKIN.

(Matter of Foster Construction Corporation, Bankrupt.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

LOUIS JERSAWIT,
Attorney for Respondent.

THE COURT PRESS, INC.

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	3
Summary of Argument	5
Argument:	
I.—The Federal Courts have no power to make orders of arrest or to issue writs of *ne exeat* except as such power is specifically given by statute	8
II.—The respondent does not come within the provisions of the Bankruptcy Law expressly governing the subject of orders of arrest as aid to examination	15
III.—Section 9-b of the Bankruptcy Act specifically dealing with and limiting the powers to grant orders of arrest is not enlarged by the general provisions of Section 2, subd. 15	19
IV.—The order of arrest involved herein was improperly granted on the application of a single creditor	23
V.—The papers upon which the order herein was made were insufficient, and, therefore, did not give the Court jurisdiction	30
VI.—The cases relied upon by petitioner herein are neither in point nor authoritative	39
Conclusion	49
Appendix	51

CITATIONS

PAGE

Cases:

Basch, In re, 97 Fed. 761 ..... 44, 45
Berkowitz, In re, 173 Fed. 1012 43

Cock v. *Ravie,* 6 Ves. 283 10
Chamberlain Mach. Wks. v. *U. S.,* 270 U. S. 347 38
Chicago County v. *Sherwood,* 148 U. S. 529..... 38

Davidor v. *Rosenberg,* 130 Wisc. 22..... 14, 21, 22
DeRivafinoli v. *Corsetti,* 4 Paige 264..... 11, 13

Etches v. *Lance,* 7 Ves. 417 11

Field v. *U. S.,* 137 Fed. 6 ..... 15, 16, 18
Fogg v. *Blair,* 139 U. S. 118 38

Gernon v. *Boecaline,* 2 Wash. C. C. 130.... 11, 14, 15
Graham v. *Stuckem,* 4 Blatchf. 50; 10 Fed. Cases 945 (No. 5,677) 11

Hale, In re, 11 Fed. Cases 180 (No. 5911).... 47, 48
Hamray v. *McEntire,* 11 Ves. 54 11
Hassenbusch, In re, 108 Fed. 35 ..... 23, 36

Jackson v. *Petrie,* 10 Ves. 165 10
Jersey Island Packing Co., In re, 138 Fed. 625.. 44

Kaufman v. *U. S.,* 212 Fed. 613 ..... 15, 17, 18
Kelley, U. S. ex rel. v. *Peters,* 166 Fed. 613.... 21

Lewensohn, In re, 121 Fed. 538 ..... 24, 25
Lowenstein v. *Biernbaum,* 15 Fed. Cases, 782 (No. 8,641a) 14

Oldham v. *Oldham,* 7 Ves. 410 11

Pullman's P. C. Co. v. *M. P. R. Co.,* 115 U. S. 587 38

PAGE

Roddam v. *Hetherington*, 5 Ves. 91 10

Rogers-Johnson Building Co., In re, 30 Fed. (2nd) 359 .....24, 26, 29

Russell, In re, 101 Fed. 248 .....44, 46, 47

Seymour v. *Hazard*, 1 Johns. Ch. R. 1.....11, 13

Shaftoe v. *Shaftoe*, 7 Ves. 171 10

U. S. v. *Ames*, 99 U. S. 35 38

U. S. v. *Coolidge*, 1 Wheat. 415 9

Van De Mark, In re, 175 Fed. 287 29

Whitehead v. *Patridge*, 3 Swanstron, 365..... 10

Statutes:

Bankruptcy Act, Sec. 1 (4) 2, 51

Sec. 2 (15).....2, 6, 19, 41, 42, 44, 51

Sec. 7 (a) 2, 51

Sec. 9 (b),

2, 6, 8, 15, 19, 30, 40, 41, 42, 44, 52

Sec. 21 (a) 2, 43, 44, 53

Judicial Code, Sec, 261 (28 U. S. C. A. 376),

2, 5, 13, 40, 43, 44, 53

General Orders in Bankruptcy

Order XIII 28, 29

Texts:

Beames, *Ne Exeat Regno*, p. 7 .....12, 22

Coke, 3rd Institute, Cap. 84, p. 180.....10, 11

1 Collier on Bankruptcy, p. 390..... 40

1 Collier on Bankruptcy, pp. 190-191..... 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 429.

D. GINSBERG & SONS, INC.,

Petitioner,

—against—

JOSEPH POPKIN.

(Matter of Foster Construction Corporation, Bankrupt.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Circuit Court of Appeals is reported in 50 F. (2d) 693.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered July 1st, 1931 (R. 43). The petition for writ of certiorari was filed October 1st, 1931, and was granted November 2nd, 1931 (R. 44). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code (28 U. S. C. A. 347).

Question Presented.

Can the District Court, sitting in Bankruptcy, issue a warrant of arrest against the officer of a bankrupt corporation, *not himself a bankrupt,* to secure his attendance for the purpose of examining him concerning the property of the bankrupt corporation, in contravention of provisions of Section 9 (b) of the Bankruptcy Act, in that:

(a) The Application was made more than six months after the qualification of the Trustee;

(b) The Application was made not by the Trustee but by a single creditor;

(c) The Application was not supported by the *affidavits of at least two persons* that the officer sought to be arrested was about to leave the district in which he resided or had his principal place of business, to avoid examination;

(d) Where, on the contrary, it affirmatively appears from the petition upon which the warrant of arrest was granted that the person sought to be arrested was not then within the district; and the only evidence presented as to residence is to the effect that he resided in another district.

Statutes Involved.

The statutes involved are Sections 1 (4), 2 (15), 7 (a), 9 (b) and 21 (a) of the Bankruptcy Act of 1898, and Section 261 of the Judicial Code. They appear in full in the appendix hereto.

Statement.

Following are the essential facts as they appear from the record: On September 23rd, 1929, an involuntary petition in bankruptcy was filed against Foster Construction Corporation in the United States District Court for the Eastern District of New York. Sometime between that date and July 1st, 1930, that corporation was adjudicated a bankrupt, and on the last named date a Trustee was appointed and he duly qualified (R. 2). The respondent Joseph Popkin was the president of the corporation at the time the petition in bankruptcy was filed against it.

On December 4th, 1930, the petitioner, D. Ginsberg & Sons, Inc., obtained from the District Court for the Southern District of New York, an ancillary order, variously referred to as a writ of *ne exeat* and a warrant of arrest, which ordered the respondent to appear before a Special Commissioner in bankruptcy in the last named district, and also directed the United States Marshal to take the respondent into custody and bring him forthwith for examination before the Judge making the order, or, at his option, cause him to give bail in the sum of Ten thousand ($10,000) Dollars that he, the respondent, "will not depart from or go, or attempt to depart from or go, beyond the territorial jurisdiction of this Court without its leave" (R. 4-5).

The respondent was taken into custody under this order, and was released on furnishing bail in the sum of Ten thousand ($10,000) Dollars. He then moved to vacate the order, but this motion was denied. The opinion of Judge Woolsey denying this motion is printed in the Record at pages 29-34. On appeal to the Circuit

Court of Appeals for the Second Circuit, that court reversed the last-mentioned order and directed the District Court to grant the motion to vacate (R. 43-44).

It affirmatively appears from the moving papers that at the time of the issuance of the writ of *ne exeat* or warrant of arrest by the District Court for the Southern District of New York, the respondent was not within that District (R. 6). It nowhere appears in the record where the respondent had his business office. From the fact that he was the president of the bankrupt, it may be fairly assumed that his place of business at the time of the filing of the bankruptcy petition was in the Eastern District of New York. The only proof as to residence is that in the latter part of January 1930, the respondent lived within the territorial jurisdiction of the Eastern District of New York (R. 27-28). The petition on which the writ or order was made states that the last place where the respondent was seen was the City of Jersey City, in the State of New Jersey, "where Joseph Popkin apparently went to spend last night". This petition also contains the following additional statement which seems relevant:

> "Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City" (R. 6).

Statements and Allegations of Which There is No Proof.

The Record which consists of various petitions made by the petitioner-creditor is full of statements and allegations of which there is no proof; and as to some of which there is, indeed, proof to the contrary in this

very record. Unfortunately, the District Court, laboring under what we believe to be an entirely mistaken conception of the law applicable to this case, assumed that these various allegations were equivalent to proof of the facts sought to be charged, and its decision was based on that assumption. These matters will be discussed more fully further below. We shall, therefore, only summarize here our contentions in that respect:

(a) There is no *proof* in the record that the respondent was a *fugitive* either for a long time or for any time.

(b) There is no *proof* in the record that the respondent had converted the sum of One hundred thousand ($100,000) Dollars or any other sum belonging to the bankrupt corporation.

(c) There is no *proof* that the respondent has disobeyed any subpoena for his examination or any other order or mandate of any court.

Summary of Argument.

1. The Federal Courts have no inherent power to issue orders of arrest, or writs of *ne exeat*. This power did not exist under the common law of England. *A fortiori*, it does not exist in the Federal Courts, in which there is no such thing as a criminal common law, nor any inherent right to issue punitive orders. All Federal Courts have only such power with respect to these matters as is specifically granted them by statute.

2. The power of any Federal Courts to issue writs of *ne exeat* is governed by Section 261 of the Judicial Code; and the power of a Bankruptcy Court to issue an order of arrest in aid of an examination is given, defined

and *limited,* by Section 9 (b) of the Bankruptcy Act. That section limits the power of the Bankruptcy Court to issue such orders of arrest—

(a) *As to the person* against whom such order may be made, by prescribing that such order can only be made against *the bankrupt;*

(b) *As to the time* within which it may be made, by providing that such order can only be made between the time of the filing of the petition and one month from the appointment of a Trustee;

(c) *As to the length of time* of incarceration, by providing that the person against whom the order runs can only be detained for a period of ten days;

(d) *As to the papers upon which it can be made,* by providing that before the order can be made there must be presented to the Court making it proof of certain matters, and that the proof must be in the form of *affidavits made by two persons.*

3. That Section 2, subd. 15 of the Bankruptcy Act does not in any way enlarge the powers of the District Court with respect to such orders. That the last named subdivision deals with *general* matters, not specifically covered by other parts of the Bankruptcy Act, or any other existing law; and is intended to cover minor matters which could not be dealt with in the Bankruptcy Act in detail within the scheme of that Act, and particularly with reference to the administration of bankrupt estates which comes into its custody. That, in any event, no power derived from that sub-section can be exercised *contrary* to specific limitations upon that power contained in other portions of the Act itself.

4. That an order such as is involved herein could only be made upon the application of the Trustee, after one has been appointed.

5. That the District Court was, therefore, clearly without power to make the order reversed by the order appealed from, for the reasons—

(a) That the respondent is not a bankrupt;

(b) That the order was made long after the expiration of one month from the appointment and qualification of the Trustee;

(c) That the application was not made by the Trustee;

(d) That there was no proof by *affidavits of two persons* of the matter of which proof must be presented to the Court before such order can be made;

(e) That there was no *proof* of any kind of the matters which must be proven to the Court before such an order may be made;

(f) That as to some of these matters there was, indeed, proof, or at least allegations by the petitioner, to the contrary.

ARGUMENT.

I.

The Federal Courts have no power to make orders of arrest or to issue writs of *ne exeat* except as such power is specifically given by statute.

In the argument in the District Court upon the application to vacate the order of December 4th, 1930, that order was referred to as a writ of *ne exeat*. It was thus that the present petitioner, the respondent in the District Court, sought to avoid the force of Section 9 (b) of the Bankruptcy Act which specifically limits the powers of the District Court in the issuance of orders of arrest; and it was thus that the petitioner herein sought to excuse its failure to comply with the provisions of that section with respect to the character and nature of the *proof* which must be presented to the Court before an order of arrest can be made by the Bankruptcy Court under the stringent provisions of that section. The order of Judge Inch of the Eastern District Court, under which the application was made to the Southern District Court, for the issuance of the warrant or writ against the present respondent did not give the petitioner herein the right to apply for an order of arrest, but only for "orders *ne exeat*" (R. 10). And it was upon that theory that the application of the respondent herein (the petitioner in the District Court) to have that writ or order vacated was denied by Judge Woolsey of the Southern District Court. Judge Woolsey begins his opinion with a statement that the application to Judge Goddard, who made the order of December 4th, 1930, in the Southern District, was authorized by the order of Judge Inch of

the Eastern District made December 3rd, 1930. In stating what the last mentioned order authorized the creditor to do, he says that it authorized him to apply

> "For orders *ne exeat* directed to the Marshal of the Southern District of New York" (R. 30).

And, in concluding his opinion denying the present respondent's motion to vacate Judge Goddard's order, Judge Woolsey says:

> "The order issued by Judge Goddard, even if it be not regarded as a strictly canonical *ne exeat* order is in the nature of such an order" (R. 34).

On this appeal, however, the petitioner herein has evidently abandoned that position, as there is not a single reference to writs of *ne exeat* in the brief submitted on behalf of the petitioner.

Under these circumstances, it is rather difficult for counsel to speak with certainty as to just what the order involved really is—whether to treat it as a writ of *ne exeat,* as it was treated by the Judge who made it and the Judge who sustained it, as well as by counsel for the petitioner in the District Court, or as a warrant of arrest, as it is treated by opposing counsel on this appeal. In order, therefore, to escape the force of any theory upon which the order might be sought to be sustained, we shall discuss both aspects, although we shall direct our principal attention to the theory upon which it is sought to sustain the order in the brief of counsel for the petitioner on this appeal.

It is now well settled that there is no criminal common law of the United States (*U. S.* v. *Coolidge,* 1 Wheat. 415). In fact, there is no such thing as a common law of the United States whether criminal or civil. But the

latter question need not be discussed here since clearly orders of arrest and writs of *ne exeat,* being in derogation of liberty, are penal or punitive measures, which cannot be exercised by the Federal Courts except where granted by statute. But even if it were held that the Federal Courts can exercise both the civil and criminal common law as it existed in England at the time of our Declaration of Independence, it would still be true that the Federal Courts have no power to make orders of arrest or issue writs of *ne exeat,* except as such power is specifically granted to them by statute, for no such power existed at common law in England.

As to warrants of arrest, they being concededly criminal in their nature, the matter needs no further argument. As to writs of *ne exeat,* it is sufficient to say that this writ originally was a writ of High Prerogative, used only for purposes of State, and came but gradually to be applied in the interest of private parties. It was and is the settled law of England that this writ is of statutory origin, and being against common right and the liberty of the subject, the grant of power to issue the same must be strictly construed. It must not, therefore, issue except under such safeguards as are provided by the statutes creating the power and the rules which the Courts have imposed upon themselves in exercising it.

Coke, 3rd Institute, Cap. 84;
Cock v. *Ravie,* 6 Ves. 283;
Shaftoe v. *Shaftoe,* 7 Ves. 171;
Jackson v. *Petrie,* 10 Ves. 165;
Roddam v. *Hetherington,* 5 Ves. 91;
Whitehead v. *Patridge,* 3 Swanstron 365;

Oldham v. *Oldham*, 7 Ves. 410;
Etches v. *Lance*, 7 Ves. 417;
Hamray v. *McEntire*, 11 Ves. 54;
Seymour v. *Hazard*, 1 Johns. Ch. R. 1;
DeRivafinoli v. *Corsetti*, 4 Paige 264;
Graham v. *Stuckem*, 4 Blatchf. 50, 10 Fed. Cases 945 (No. 5,677);
Gernon v. *Boecaline*, 2 Wash. C. C. 130.

According to Coke, it is the natural right of a free-born Englishman to move freely about and go wherever he pleases, including out of the kingdom, except when prohibited by statute; and the statutory prohibitions relate only to clergymen and knights. The reasons for these statutes need not be gone into here, except that it must be borne in mind that the exceptions were based on the assumption that the departure from the country is either for a treasonable purpose or otherwise in pursuance of some illegal design or intent. Where the reason does not exist, the statutory prohibition does not apply.

> "Mich. 12 & 13 Eliz. It was resolved by all the justices (except two) that a merchant of London departing the Realm, to the intent to live freely from the penalty of the law, and out of his due obedience to the queen, and not for any merchandise, that it was no contempt to the queen, for merchants were excepted out of the said statute of 5R. 2, cap. 2, and by the common law merchants might passe the sea without license, though it were not to merchandise."
>
> Coke, 3rd Inst., cap. 84, page 180.

Beames, in his well known work on this subject, says:

> "It (the writ *ne exeat*) appears to have been unknown to the ancient Common Law, which, in the freedom of its spirit allowed every man to depart the Realm at his own pleasure."
>
> Beames, *Ne Exeat Regno,* page 7.

In the English practice as it existed before the time of the separation of this country from the British Empire, the power of the Court of Chancery—the only court which could issue the writ—to issue the same was greatly circumscribed, so that it could issue only in a few well-defined cases, and there was no *general* power to issue it. These rules were clearly stated in a series of decisions made by Lord Chancellor Eldon and other Chancellors in the early part of the Nineteenth Century; and were to the effect that it would only issue in case of a liquidated demand *actually due,* of an *equitable* nature, under circumstances which would entitle the plaintiff to have the defendant put under bail in an action at law.

In the first case cited, the writ was refused by Lord Eldon in a case where it would otherwise have been proper, because the claim was not *actually due;* the claim being based on the fact that the complainants had gone surety for the defendant, and, although there was a breach by the defendant of the contract under which the complainants went surety, the complainants had actually not paid anything under their bond.

In the second case cited, the Lord Chancellor held that, although a writ will properly issue in an alimony case, it will only be issued for the amount of alimony

then actually due, and not for any alimony that may become due in the future, saying:

> "In the ordinary case the Court never marks the writ for more than is due. Certainly the case of alimony is stated as a case of exception: *but it is wrong.*"

The same rule prevailed in this country after its separation from England. It was applied by Chancellor Kent in *Seymour* v. *Hazard, supra,* and by Chancellor Wolworth in *DeRivafinoli* v. *Corsetti, supra.* The same rule applied in the federal cases, as is shown in the last case cited above.

It is thus clear that even in our State courts, which have inherited the general equity jurisdiction of the English Court of Chancery, there is no general power to issue writs of *ne exeat,* and that their issuance is very rigorously circumscribed, and that these rules make it inapplicable in a case like the case at bar, if it were pending in a State court of equity, even in the absence of statutes regulating the practice.

But our court is not a State court, which has *plenary* equity powers; and the issuance of the writ *is* regulated by statute. That statute is Section 261 of the Judicial Code, which specifically limits the issuance of writs of *ne exeat* in two ways: first, as to person against whom it may be issued, by making it issue only against *defendant;* and, second, as to the case in which it would issue, by making the only case in which it would issue a threatened departure *from the United States.*

Indeed, it was held that even at common law it cannot issue against a complainant on a counter-demand set up by a defendant, even though the circumstances

were such that it would have been proper to issue the same if the defendant had brought an independent suit against the complainant. *Davidor* v. *Rosenberg,* 130 Wisc. 22. It goes without saying that it cannot issue against third parties, even though they be officers of a defendant corporation.

In the *Gernon* case, it was specifically held by Mr. Justice Washington of the United States Supreme Court, while sitting as Circuit Judge, that federal judges have no inherent jurisdiction to issue writs of *ne exeat* or *orders of arrest.* It was, therefore, held, that in the absence of specific authority to district judges to issue such writs, such judges could not issue the same, when sitting as circuit judges, although circuit courts did have specific authority granted to them by statute. *Gernon* v. *Boecaline,* 2 Wash. C. C. 130.

To the same effect: *Lowenstein* v. *Biernbaum,* 15 Fed. Cases 782 (No. 8, 641a).

In the same case, it was expressly held, and, indeed, admitted by counsel for the party who had obtained the writ, that the writ could not issue where the party is merely about to leave the jurisdiction of the court, but only where he is about to leave the *United States.*

Turning now from writs of *ne exeat* to orders of arrest, we shall find that, if anything, the rules with respect to the latter are even more stringent than with respect to writs of *ne exeat.* The reason is obvious: Whatever difference of opinion there may be as to the origin of the power of the English Court of Chancery, which our State courts are supposed to have inherited, with respect to writs of *ne exeat,* there can be no ques-

tion that orders of arrest are always and everywhere, in this country, governed by statutory provisions, which must be strictly adhered to. We have already quoted Mr. Justice Washington to the effect that federal courts have no inherent power to issue *orders of arrest*. *Gernon* v. *Boecaline, supra.* We may now proceed to examine the existing statutes with respect to such orders.

II.

The respondent does not come within the provisions of the Bankruptcy Law expressly governing the subject of orders of arrest as aid to examination.

Section 9-b of the Bankruptcy Act regulates and expressly *limits* the power of the bankruptcy courts to issue orders of arrest in aid of examination, and we have already shown the ways in which that power is limited. It is clear that those limitations exclude the respondent herein from the purview of that section, and that no order of arrest, therefore, could be granted against him.

At the very threshold of the inquiry, we are confronted with the fact that the respondent herein is concededly not a bankrupt. This is so clear that only a brief reference to the authorities should be sufficient.

Field v. *United States*, 137 Fed. Rep. 6;
Kaufman v. *United States*, 212 Fed. Rep. 613.
In Re Blargolies 266 Fed. 203.

In the first case cited, Circuit Judge Sanborn said:

"The plaintiff in error, who was not a bankrupt but who was vice president and one of the

directors of the Brown-Rollosson Company, a corporation which was a bankrupt, was indicted, a demurrer to the indictment was overruled, and he was convicted under section 29b of the bankruptcy law of July 1, 1898, of the offense of having knowingly and fraudulently concealed property which belonged to the estate of the corporation in bankruptcy from the trustee. Section 29b reads:

> 'That a *person* shall be punished by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy.' * * *

The argument by which counsel attempt to sustain the indictment and conviction is that clause 19 of section 1 of the bankruptcy law broadens the meaning of section 29b so that it includes the officers of a bankrupt corporation. * * * That clause reads:

> ' "Persons" shall include corporations except where otherwise specified, and *officers*, partnerships and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations.'

A careful reading of this clause, however, in connection with the terms of section 29b, convinces that it can have no effect to extend the

terms or broaden the true interpretation of the latter subsection. * * * The suggestion that concealment by an officer of a bankrupt corporation of the property of its estate in bankruptcy from its trustee is clearly within the mischief of this sub-section, and therefore within its true interpretation, *is unworthy of serious consideration.* A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified."

And in the second case cited, Circuit Judge Rogers said:

"It may be conceded that the defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has 'knowingly or fraudulently concealed while a bankrupt or after his discharge'. *As the defendant is not alleged ever to have been a bankrupt the section is without application to him.*"

The last case cited is interesting in more than one respect. Not only did the learned Court in that case adopt as conclusive and follow the decision in the *Field* case, but the case shows that such was the opinion of the entire profession, at least since the decision in the *Field* case. For the defendant, who was the president of the bankrupt corporation, and was charged with having sold its property and converted its assets to his own use, was not indicted for concealing assets, as in the *Field* case, but for *aiding and abetting* the defendant corporation in concealing its assets from the Trustee. But the case shows more than that. It shows that the Bankruptcy Act when supplemented with the other

federal statutes, is perfectly sufficient to take care of all contingencies which may be expected to arise in the course of the administration of bankrupt estates, including cases of peculation by officers of bankrupt corporations or other offenses on their part.

We think that our federal courts are not ready to adopt the doctrine that "necessity knows no law", and that they can resort to illegal practices whenever a judge thinks that a necessity has arisen which requires the exercise of a power not granted by statute. But even if we were to succumb to the modern hysteria which clamors for the disregard of personal rights protected by constitutional and statutory provisions because of alleged necessity, we respectfully submit, that there is no such necessity at all in the present instance, or in the class of cases to which it belongs. The two cases just cited illustrate the difference between the attempt to unwarrantably extend statutory provisions in order to meet an imaginary necessity, and the proper use of powers actually granted by statute to meet actual situations. The first must, of necessity, result in failure; while in the second, success is assured. In the *Field* case, a possibly guilty defendant escaped, because an improper attempt was made to stretch the provisions of Bankruptcy Law to cover a case which it clearly does not cover; while in the *Kaufman* case a similar criminal was brought to book because the proper statutory provision was put into motion. In the *Field* case, which was decided in the early years of the present Bankruptcy Law, there was some excuse for the error made by those who attempted to put an improper interpretation on the word "bankrupt" as used in the Bankruptcy Act. There is none such at this late day. With the *Kaufman* de-

cision more than fifteen years old, no claim can be made that there are no express provisions in the federal statutes sufficient for the apprehension and punishment of a criminal such as the respondent herein must be if the petitioner's claims are to be believed.

The truth is, of course, that these claims are wholly unfounded; which is the real reason why resort is made to an improper procedure, and an attempt made to give statutory provisions interpretations which they cannot bear. This aspect of the case will be discussed more fully under point "V", where we intend to discuss the papers upon which the order of arrest was granted.

There is no occasion to discuss at length the further limitations of Section 9-b upon the power to issue orders of arrest, namely, the failure to make the application within the time prescribed in that section, or upon proof by the affidavits of two persons, as is also required by that section, for, concededly, those provisions of the statute were disregarded,—upon the theory that the order was not issued under that section at all, but under Section 2, subd. 15, which is supposed to *enlarge* the powers of the court beyond the powers granted to it by Section 9-b. We may, therefore, turn to that question.

III.

Section 9-b of the Bankruptcy Act specifically *dealing with* and *limiting* the power to grant orders of arrest is not enlarged by the general provisions of Section 2, subd. 15.

There is nothing new in the attempt to bolster up the improper use of powers specifically regulated by statute by resort to some vague provisions of another

statute. In fact that was exactly the situation in the *Field* case, cited above at length. The Court in that case disposed of it by holding that the *general language* must be read in connection with the *specific provisions* governing the subject under consideration. And the Court was merely applying the general principle of law that when two statutes apply to a case, one general and one specific, the general statute must be read in the light of, and is *limited by,* the provisions of the specific statute governing the situation.

It is contended on behalf of the petitioner in this court that the provisions of Section 2, subd. 15, give the Bankruptcy Court *additional* powers. There is serious doubt about that, and there is very respectable authority, at least in the domain of constitutional law, that such general clauses do not give any additional power—and the use of the words "in addition" in that subdivision would make no difference. However, we need not here enter upon this interesting question, as it really does not affect the situation in our case. For clearly, the words "in addition" cannot possibly mean *"contrary to"*, which they would have to mean in order to give them the effect contended for by those who think that orders of arrest may be made by the Bankruptcy Court *in disregard of the specific limitations* contained in Section 9-b. One might as well argue that by reason of the so-called "necessary and proper" clause of the United States Constitution, Congress may make a law whittling away the protection to personal liberty provided by the specific provisions of the same Constitution defining what is treason against the United States and how it must be proved. All of this would seem so elementary as not to require, or even permit, of discussion but for the fact

that the District Court *did* disregard these specific provisions, and offered as an excuse that the order of arrest herein is a "non-canonical" writ of *ne exeat*, and need not, therefore, comply with the law governing either an order of arrest or a writ of *ne exeat*. We shall, therefore, quote some authority:

> "The right to demand bail, it is argued, is given by section 2, subd. 15, of the act; but that provision is an authority to make orders generally in addition to those specifically provided for, and to give it the effect here demanded would be inconsistent with section 9b, *where the conditions under which it may be required are specifically defined, and do not include a case like this.*"
>
> *U. S. ex rel. Kelley* v. *Peters*, 166 Fed. Rep. 613.

See also,

Davidor v. *Rosenberg*, 130 Wisc. 22.

The question involved in the case just cited was similar to that in the case at bar, in that there, also, it was sought to enlarge the powers of the court by a general provision contained in a statute. There was this difference, however, between the two cases, which makes our case a much stronger one against the attempt to enlarge the powers of the court: In the case cited the power itself was not conferred by statute, which existed at common law, which the statute merely confirmed. And there was no specific *limitation* upon the powers of the court. Nevertheless, the Supreme Court of Wisconsin, which has been referred to in a well-known work as "A Great Court", and deservedly so, held that the general statute cannot be held to have enlarged the

powers of the court, and that the power must be exercised under the traditional limitations in the absence of *specific additional* powers. Speaking for that court, Judge John B. Winslow, afterwards Chief Justice thereof, said:

> "It (the writ of *ne exeat*) is issued only against a debtor who was a party to the suit, not against a third person not a debtor whether he be a party to the suit or not. The ancient writ always recited that it appears that the defendant is indebted to the complainant and designs quickly to go beyond the seas. Beames, *Ne Exeat,* 18. Nor is this latter rule in any way changed by the terms of sec. 2784, *supra,* which provides that the writ may be granted to prevent 'any person' from leaving the state, for the obvious reason that the following section provides that no writ shall be granted unless it appears that 'sufficient grounds' exist therefor. Sufficient grounds means, as we have seen, grounds sufficient under the principles of the common law, and no grounds are sufficient under those principles unless it appears that the party is a debtor."

Davidor v. Rosenberg, 130 Wisc. 22.

In that case, the writ had been issued against the complainant and a woman named Dawson, not a party, on a counterclaim by the defendant, supported by affidavit to the effect that the party debtor had transferred to the Dawson woman all of his property without consideration, in fraud of his creditors, and that both were about to leave the state. The decision of the Supreme Court was to the effect that the writ had been issued improperly against both, for the reason that *neither was a defendant.*

The matter was put as succinctly as possible by Judge Clark, speaking for the Circuit Court of Appeals for the Sixth Circuit (Circuit Judge Lurton, later Mr. Justice Lurton of the Supreme Court, being of the Court), in the case of *In re Hassenbusch,* when he said:

> "No discussion could make this plainer than a simple reference to the terms of the two provisions of the statute, from which it is obvious that there is no substantial ground for the proposition that the broader powers conferred on the District Court in the Fifteenth Subdivision of jurisdiction *do not extend or enlarge a jurisdiction separately dealt with, and specifically and carefully defined and limited like the power contained in clause (b) of Section 9.*"
>
> *In re Hassenbusch,* 108 Fed. Rep. 35.

IV.

The order of arrest involved herein was improperly granted on the application of a single creditor.

It is respectfully submitted that the order of arrest involved herein could be granted only on the application of the Trustee in bankruptcy of the bankrupt corporation, except, possibly, before the appointment of such Trustee.

It is well settled that in matters relating to the administration of the estate in bankruptcy generally, and the protection of the general body of creditors, which includes all such proceedings as may be neces-

sary to reduce the estate to possession, or to follow up its assets, or to initiate any proceedings looking to any of these things, the Trustee in bankruptcy represents not only the estate as such but the general body of creditors, and he is, therefore, the only one entitled to so proceed. This rule is well founded, as otherwise there would be confusion in the administration of the estate, which would result in harm to the entire body of creditors, and might also lead to injustice to the bankrupt, in that each creditor might harass him separately for the purpose of gaining a personal advantage, a practice, unfortunately, only too common in bankruptcy courts.

In re Lewensohn, 121 Fed. Rep. 538;
In re Rogers-Johnson Building Co., 30 Fed. (2nd) 359.

In the first case cited, the unanimous Circuit Court of Appeals for the Second Circuit, speaking through Judge Wallace, said:

> "The petition of review presents a question of practice of considerable importance. The order of the Court below has sanctioned a proceeding by one of the creditors of the bankrupt instituted *without the concurrence of the trustee* to re-examine the claim of various other creditors, which have been proved and allowed. Such a practice, when the estate and the interests of all the creditors are represented by the trustee, does not subserve any necessary purpose, and *opens the door to great abuse* * * *. The trustee represents every creditor * * *, *if the trustee should without sufficient reason, refuse to proceed, the Court by its order could compel him to do so, or remove him*

> *for disobedience.* * * * It has been held that under the present Act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that *the trustee is the only party who can do so.*"
>
> *In re Lewensohn,* 121 Fed. Rep. 538.

An application for a writ of certiorari to review the decision in the *Lewensohn* case was denied by this Court on April 27th, 1903. This Court thus approved by implication the rule laid down by the Circuit Court of Appeals for the Second Circuit, as stated by Judge Wallace; and that has been the accepted opinion of the profession ever since.

This position of our Courts has been reiterated in a recent case by the Circuit Court of Appeals for the Eighth Circuit, in a case where certain creditors of a bankrupt sought to appeal from an order made by the Referee in bankruptcy from which the Trustee refused to take an appeal. In denying that right, the Court said:

> "This is an appeal by certain creditors of a bankrupt estate from an order made by the Court below, denying such creditors the right to petition for a review of certain orders made by the referee in bankruptcy. A motion to dismiss the appeal has been filed primarily upon the ground that minority creditors have no absolute right to appear for the estate, *after a trustee has been appointed.* * * * The question presented is clear-cut. Does a single creditor have the absolute right to petition for a review from an order made by a referee in bankruptcy? But little help can be found in the act or the general

orders in aid of the solution of the question as to who shall prevail in the event the trustee and a creditor disagree as to procedure. * * * *However, in other sections of the act, as to controversies with third parties, the trustee alone is recognized as representing the bankrupt estate.* When bankruptcy comes, the identity of the individual creditor is merged in a class. He may vote for a trustee, but if he is outvoted, a trustee not of his own choosing acts for him. He votes to disapprove a composition, but a majority and the court can compel him to take it. He does not believe a liquidated claim should be compromised, but Section 27 of the act gives *that power to the trustee and the court. Provision is made for the removal of a faithless trustee, but, as long as he is trustee, he speaks for all the creditors. Without some such system of representation the whole law would fall of its own weight.*"

In re Rogers-Johnson Building Co., 30 Fed. (2nd) 359.

But aside from the general rule requiring all applications in which the entire body of creditors is interested to be made by the Trustee, there is in this case, we respectfully submit, *specific statutory direction* for such course in the provisions of Section 9-b. In discussing the limitation as to the time within which such an order may be made, we have pointed out the provision of Section 9-b which says that such an order can only be made between the time of the filing of the petition and the expiration of one month *from the appointment of the Trustee.* We respectfully submit that this provision is not only a limitation *as to time when,* but also

as to the party *who* may make the application. It will be noted that the limitation is not as to any period of time from the filing of the petition, but *from the appointment of the Trustee.* Such a limitation as to the time would be absurd if the intention of the framers of the law had not been that it is the trustee who is to make the application. We do not mean to say that the limitation is absolute in the sense that it cannot be made by a creditor *before* the appointment of a trustee. But it is clear that *after* the appointment of a trustee, it must be made by the trustee. Hence, the period of limitation starts running from the appointment of the trustee. This is the only theory which gives sense to the provision.

It is argued, however, that in this case, this rule should be suspended, and a different rule should apply here from any other bankruptcy case. The basis for this contention is an allegation in the petition upon which the order of arrest involved herein was granted that it would have been useless to ask the Trustee to proceed in the premises, coupled with aspersions on the character of the Trustee, a member of the Bar. And counsel invokes the rule applicable in stockholders' suits that where a corporation is controlled by the adverse party and it would be manifestly useless to apply to the corporation to bring the suit, the stockholder may proceed without making such application.

The District Court, proceeding upon the erroneous assumption that the allegations in the petition are equivalent to proof of the facts charged, upheld this contention. We show further below that the theory upon which the District Court proceeded as to the effect of the allegations in the petition was entirely erroneous; and that the charges against the Trustee were entirely

unproven and their correctness highly improbable. Here, we desire to respectfully submit that the rule invoked has no application to the present situation. And for a very good reason: A stockholder who desires to bring a suit to protect the rights of a corporation against officers or directors who are looting its treasury or improperly disposing of its assets, has no other remedy except to bring the very suit which he has brought. For no single stockholder, nor many stockholders together, as long as they constitute a minority, and in many cases even where they constitute a majority, can bring an action to remove the officers. In many jurisdictions, such an action can only be brought by the Attorney-General on behalf of the State. But the situation is entirely different in the case of a Trustee in bankruptcy *who is an officer of the court and always subject to removal by it.*

Order XIII of the General Orders in Bankruptcy specifically provides that the appointment of a trustee may be approved or disapproved by the referee or by the judge; and that the trustee is removable by the judge. A trustee who does not do his full duty can be ordered by the court to do it, and may be removed summarily on cause shown. If the charges against the Trustee here were true, he certainly would have been removed on application to the District Judge, for which there was ample time since the appointment on July 1st and the petition for the order of arrest, more than five months later. Also, the alleged friendliness of the Trustee to the respondent was known even before his appointment, as the petition specifically says that the petitioner and other creditors had objected to the appointment of the Trustee but that they had been outvoted (R. 7). In this connection, it should be borne in mind that the referee has a right at the election of a trustee to reject

votes on the ground that they are in the interest of the bankrupt.

In re Van De Mark, 175 Fed. Rep. 287.

In addition, as we have already pointed out, under G. B. O. XIII, both the Referee and the District Judge have a right to disapprove the appointment of the trustee no matter how many votes he received. We must, therefore, assume that either both the Referee and the Judge considered the objections to our Trustee groundless, or that the creditors did not dare to submit their objections to the test of an inquiry either by the Referee or the Judge.

Because of all of these considerations, which our case fairly typifies, the courts have held that the rule invoked by analogy from stockholders, suits do not apply to cases where creditors attempt to bring proceedings over the head of the Trustee. And in the case last cited, it was expressly held that such charges in a petition are merely conclusions of the pleader, and are not to be regarded as proof of the facts alleged.

> "In bankruptcy proceeding, allegations that trustee had failed and refused 'to protect the interests of the said bankrupt estate, but is actively co-operating with said mortgagees to deprive the general estate in bankruptcy' of rent-moneys, held conclusion of pleader."
>
> *In re Rogers-Johnson Building Co.,* 30 Fed. (2nd) 359.

V.

The papers upon which the order herein was made were insufficient, and, therefore, did not give the Court jurisdiction.

We respectfully submit that the papers upon which the order of arrest herein was granted were insufficient with respect to the *proof* required by law to give the District Court jurisdiction, and the order should have been quashed or vacated upon the application of the respondent even if this had been a proper case for the making of such an order.

The District Court having no inherent jurisdiction to issue orders of arrest, and its power being entirely statutory, its jurisdiction depends upon the presentation of the proof which is the condition upon which the exercise of the power is granted. The proof required by the statute is stated in terms which are simple and unambiguous, and which concededly have not been complied with. There is no proof by the *affidavits of two persons.* In fact, *there is no proof by affidavit at all*—all we have is allegations in a petition made by a person who concededly knows nothing of his own knowledge. But, we respectfully submit, quite aside from the provisions of the statute, and assuming that the Court had inherent jurisdiction to issue orders of arrest in disregard of the particular provisions of Section 9-b, the Court would still be without jurisdiction, because there is no proof of any kind of the basic requirements for such an order, as the following considerations will clearly demonstrate.

The two basic facts upon which the District Court proceeded in making the order, and in denying the

motion to vacate, were (1) that the respondent is a fugitive, and (2) that he had stolen or converted to his own use large sums of money belonging to the bankrupt estate.

But upon turning to the record, we find that there is not a scintilla of *proof* of either of these facts. As already stated, the charges are made not by affidavit but in a petition by a person who concededly knew nothing of his own knowledge. We are, therefore, relegated to other sources of information as to proof. Let us, therefore, search the record for any proof that it might contain on these points. And, it is respectfully submitted, such a search will reveal no proof of any kind.

1. *As to the allegation that the respondent is a fugitive.* We have already referred to the fact that the District Court was so misled by the unproved charges in the petition that the respondent was a fugitive that the fact was *assumed* to be true. But that assumption is entirely unwarranted. The petition upon which the order of arrest was made states, *upon information and belief,* that the respondent had been served with a subpoena for his examination issued out of the Eastern District Court; that an attorney representing the respondent denied on his behalf that the respondent had been served, but promised nevertheless to produce him on a certain day; that *prior* to that day, the District Court, presumably proceeding upon the assumption that the respondent had been served, made an order directing him to show cause why he should not be punished for contempt for failure to appear in response to the subpoena; that the order to show cause was never served on the respondent; and that thereupon, the respondent

still not appearing, the Eastern District Court made an order for his arrest similar to the order here in question.

Such are the allegations. Now as to their proof, or their meaning and significance in our connection.

It goes without saying that the failure of the respondent to appear because an attorney had promised to produce him (assuming that he had never been served with the original subpoena) when the District Court refused to accept that attorney's offer to produce him on a certain day and issued an order to show cause to punish for contempt without waiting for his appearance on the promised day, would not make the respondent a fugitive,—even if there were proof that the promise had been made by his authority, of which there is none in the record. His failure to voluntarily appear may, therefore, be eliminated from further consideration. And the question resolves itself into a question as to whether or not there is any proof of the service of the original subpoena—since everything that the Eastern District Court did subsequent to the return day of that subpoena was predicated upon the service of that subpoena, and everything that the Southern District Court did was predicated upon the regularity of the proceedings in the Eastern District Court.

The question, therefore, is: Is there any *proof* of the service of that subpoena? We respectfully submit that there is not a scintilla of evidence of such service, although such proof must have been in the possession of the petitioner, *if it were true that the respondent was actually served with that subpoena.*

There is only one affidavit in the entire record, and that is the affidavit of Nathaniel M. Satloff, printed on Record pages 27-29. An examination of that affidavit will

show that the affiant was a process server in the employ of the attorney for the petitioner, and that both, the original subpoena directed to this respondent as well as the order to show cause why he should not be punished for contempt, were turned over to this affiant, Satloff, for service. Affiant avers that he attempted to serve the order to show cause, but never did serve it. As to the original subpoena, he says *that he turned it over for service to one Greenberg, a process server in his employ, and that Greenberg "effected service" of the same. But there is no affidavit by Greenberg, who is supposed to have "effected service", and not even an explanation why Greenberg's affidavit is not produced.*

The entire structure of contempt of court, writ of *ne exeat,* etc., is thus built up on an affidavit by Satloff that he had given the subpoena to somebody else to serve, with no affidavit from that somebody that the service had actually been made. With no proof of the service of the original subpoena, the entire structure so elaborately built up falls of its own weight with a resounding crash.

It should perhaps be added that although the petition upon which the order of arrest here is based contains many strong words as to alleged hunts for the supposed fugitive by United States Marshals and the William J. Burns Detective Agency, no certificates or affidavits either by Marshals or detective agency operatives are produced. Not that such certificates or affidavits would be of any importance in the absence of proof of the service of the original subpoena. We take it that a person not served by subpoena, and not indicted for any crime, is at liberty to move about the country at his pleasure. Nevertheless, the absence of any such

certificate or affidavit, which could be easily produced if the allegations in the petition were true, is of the greatest significance. Not only in this case, but as showing the great wisdom of our legislature in requiring *proof*, rather than allegations or charges, before an order of arrest can be made.

2. *As to respondent's alleged conversion of funds belonging to the bankrupt estate.* The charges with respect to the respondent's taking, converting, or stealing, of any funds belonging to the bankrupt estate are no better supported by proof than the charge of his being a fugitive—in fact, even less so. For on this point there is some *affirmative* evidence showing the allegations to be untrue.

We must again begin with the fact that the petition is made by a person who knew nothing of his own knowledge. The source of the petitioner's information on this point is not stated, but Mr. Leo J. Linder, the attorney for the petitioner, who presumably prepared the petition, himself made the petition upon which the order of arrest issued in the Eastern District Court was based. That petition is printed in the Record on pages 22-27; and upon turning to that petition, we find that the source of Mr. Linder's information is an unnamed accountant, whom he, Leo J. Linder, attorney for petitioner, employed, presumably for the purpose of examining into the bankrupt estate's accounts and records. But neither on the application for the original order of arrest in the Eastern District Court, nor on the second application for such order of arrest to the same court, nor upon the application for the order of arrest in the Southern District Court, was any affidavit by this

unnamed accountant presented to the Court. Such an affidavit was available, since the accountant was in the employ of the attorney for the petitioner; and its absence, under well-known rules of law, creates the presumption that if produced would *not* have supported the allegations of the petition. But we are not reduced to the necessity of relying on presumptions only, strong as they are, for there is evidence in the Record that these petitions were made recklessly, and at least one of them must be untrue on this particular point. It will be recalled that the original petition, dated January 27th, 1930, was made for the purpose of procuring orders of arrest against the present respondent and one Murray J. Popkin, a son of the respondent; and that the original order of arrest made in the Eastern District Court was directed against both. In that petition, the petitioner said:

> "Your petitioner is informed by the accountant he has employed that Joseph Popkin and Murray J. Popkin, president and secretary, respectively, of the bankrupt corporation, have drawn checks to their personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of account of the bankrupt corporation" (R. 26).

Murray J. Popkin, thus charged with embezzling part of the $100,000, was arrested and examined (R. 16). The Record is significantly silent as to what happened to that embezzler. But ten months later Murray J. Popkin drops out of the picture, and *now* we have the allegation in the present petition that Joseph Popkin alone has withdrawn the same $100,000 and failed to account for it

(R. 5). The accountant employed by counsel for the petitioner had evidently given that counsel erroneous information in January, 1930, either as to the total amount withdrawn or as to who participated in the withdrawals. During the ten months that elapsed between the making of Mr. Linder's petition and the making of Dora Ginsberg's petition, the accountant had ample time to get the exact figures. But we still have the same good round sum of $100,000 (now charged entirely to Joseph Popkin's account) and still no affidavit by any accountant, or any other person who knows anything of these accounts of his own knowledge.

Thus the great embezzlement finds its place beside the great fugitive as part of a story resting largely in the fancy of imaginative petitioners.

3. *As to respondent's intent to leave the district.* Owing to the hue and cry raised by the prolific petitioners with respect to fugitives and embezzlements, which seem to have had their desired effect in the District Court, that Court overlooked the clear provision of Section 9-b that an order such as is here under consideration is not intended to bring a petitioner into a district where he does not reside for the purpose of having him examined there, but is expressly limited to *preventing* the person against whom the order is directed from *leaving the district in which he resides* or has his principal place of business. This statute is not an extradition statute. This was held in *In re Hassenbusch, supra.* Nor was it intended to prevent a man casually in a certain district from leaving that district. The purpose of the statute is clear, and it expressly limits the right to issue an order of arrest to cases where the person proceeded against "is about to leave the dis-

trict in which he resides or has his principal place of business". And it is to that effect that the statute requires *proof* in the form prescribed by it. There is no claim that there is any such proof in the record. If the allegations in the petition which is the basis of the order involved herein mean anything, they mean exactly the reverse of such proof.

4. *As to the authority of petitioner to apply for the order in question in the Southern District.* Before leaving this subject, we respectfully call the attention of the Court to another phase of the subject. Under the rules of law governing the subject, the petitioner herein could not apply to the court which made that order in question without leave from the court in which the bankruptcy was pending and the bankrupt estate was being administered. In pursuance to such rule of law, an order was made by Judge Inch of the Eastern District Court, which is recited in the order under discussion made by Judge Goddard of the Southern District Court, as a basis for his jurisdiction. A glance at Judge Inch's order will show that it authorizes the petitioner to apply to the District Court of the Southern District of New York "for orders *ne exeat*" (R. 10). So long as the applicant and the court proceeded upon the theory that the order made by Judge Goddard *was* a writ of *ne exeat,* the authority thus granted by Judge Inch was sufficient. But now that counsel for the petitioner has abandoned that position and seeks to sustain Judge Goddard's order as an order of arrest, we respectfully submit that the application was without authority, and the papers submitted to the District Court for the Southern District to that extent insufficient.

Before closing this discussion, we must advert to

the assertion made by counsel for the petitioner herein that the allegations as to which we claim there is no proof in the Record were "uncontroverted". Indeed, the absence of proof is so striking that it is only fair to the District Court to assume that it considered the "uncontroverted" character of the allegations of the petition as supplying the missing proof. But that view was clearly erroneous. The application of the respondent in the District Court to vacate the order of arrest was made upon the papers upon which that order was granted. That put him in the position of a demurrant to a complaint, and that is what the Court meant when it said that the allegations were "uncontroverted". That is certainly true in the sense that the allegations of the petition *supported by proof* must be deemed to be uncontroverted, since there is no proof to the contrary. That does not mean, however, that allegations for which there is no proof of any kind are deemed to be uncontroverted or in any way admitted. In the case of a demurrer to a pleading, which need consist only of *allegations*, the rule is well-settled that the admissions do not extend to matter not well pleaded.

United States v. *Ames*, 99 U. S. 35;
Pullman's P. C. Co. v. *M. P. R. Co.*, 115 U. S. 587;
Fogg v. *Blair*, 139 U. S. 118;
Chicago County v. *Sherwood*, 148 U. S. 529;
Chamberlain Mach. Wks. v. *U. S.*, 270 U. S. 347.

Since our statute specifically requires *proof* instead of *allegations*, it is clear that anything that is not supported by proof is not admitted by a motion to vacate

for the insufficiency *which includes insufficiency for lack of the proof required by statute.* Otherwise, we would have the absurd situation that whereas the law specifically requires that there must be proof, and that proof by affidavit of certain facts, the mere presentation of a petition without any proof, throws upon the citizen deprived of his liberty the burden of disproving the allegations.

VI.

The cases relied upon by petitioner herein are neither in point nor authoritative.

When this case was still in the District Court, and counsel for the creditor-petitioner maintained that Judge Goddard's order was a writ of *ne exeat,* certain authorities were cited in support of the right of the creditor to have the so-called non-canonical writ made. These authorities consisted of three cases, decided in the District Courts, and a reference to Collier on Bankruptcy. We shall consider the last-named authority first, for the reason that it throws some light on the theory upon which Judge Goddard made his order and Judge Woolsey denied the motion to vacate the same.

In speaking of the limitations upon the power of the District Court to make orders of arrest, Collier says:

> "The limitations here are important. Such an application can be made only between the time of the filing of the petition and the expiration of one month after the qualification of the trustee; and the bankrupt, if taken into custody, can be

detained only ten days. The affidavits of two persons are necessary; *they must show facts, not opinions*, and must be reasonably conclusive."

1 Collier on Bankruptcy, 390.

This seems to be clear and conclusive as to our learned author's opinion on the subject. But, like all modern authors—who care more for inclusiveness than critical judgment—our author had to find room for the cases hereafter to be noted, and to account for them somehow. Our learned author, therefore, took advantage of the fact that these cases refer to the orders therein made as writs of *ne exeat* to draw a distinction which may be good enough in itself—that is, as distinguishing between writs of *ne exeat* under Section 261 of the Judicial Code and orders of arrest under Section 9-b of the Bankruptcy Act—but which is manifestly insufficient to cover those three cases with the mantle of charity which our learned author evidently intended to spread over them. Although, in fairness to our learned author, it must be said that he does not say that the decisions in question were correct, but merely that it was so *"held"*. In order to understand the distinction our author seeks to make, we must refer to the paragraph preceding the one from which we have already quoted. In that earlier paragraph, Mr. Collier, in speaking of the Bankruptcy Act of 1867, and the provisions made therein with reference to the detention of bankrupts, and seeking to distinguish the same from the provisions of Section 9-b of the present Bankruptcy Act, says:

"The warrant and its purpose were more like the writ of *ne exeat*, referred to in the next paragraph. The present section is, however, *for a very different purpose.*"

Then, having discussed the provisions for orders of arrest under Section 9-b of the present Act, and having indicated the importance of its limitation as shown in the quotation first herein made from his work, Collier proceeds:

> "The similarity between the detention here authorized and that made effective through the writ of *ne exeat* will be recognized. The latter is, however, not limited to a detention for the purpose of examination. It has been *held* that a court of bankruptcy may, under the broad powers conferred by sec. 2 (15) grant *such a writ.*"

And a footnote to this passage shows that the "held" refers to the cases of *Lipke, Cohen,* and *Berkowitz,* relied on in the courts below for the sustaining of the order in question herein. Several things are made clear upon a reading of the two paragraphs in which Collier treats of the entire subject (1 Collier on Bankruptcy, 190-191):

First: That in Collier's own opinion no such order of arrest as is here under consideration could be issued under the provisions of Section 9-b of the present Bankruptcy Act.

Second: That Mr. Collier does not say that Section 2 (15) of the present Act in any way modifies the provisions of Section 9-b, or in any way enlarges upon the powers granted by *that* section. And a reading of the entire text leads to the conclusion that his own opinion is to the contrary.

Third: That he reports the fact that certain things have been *held* without taking responsibility for the correctness of these holdings.

Fourth: That in his opinion the only way in which what was held in *Lipke, Cohen* and *Berkowitz,* can be accounted for, is to hold that they were writs of *ne exeat,* and that the holding in those cases was to the effect that Section 2, subd. 15 of the present Bankruptcy Act permits the issuance of writs of *ne exeat* in addition to the *orders of arrest* provided for by Section 9-b.

It is, therefore, clear that Collier cannot be quoted as authority for the correctness of the practice resorted to by the District Court in the case at bar, but that on the contrary, under his unqualified language the order involved herein was clearly illegal; and that the doctrine advanced in explanation of what has been held is merely reported by him as a fact, for whatever it is worth, in order to make his work all inclusive.

As to the doctrine itself, as expounded in those three cases, it need hardly be said, after what has already been said, that it is entirely untenable and utterly mischievous. It would be bad enough to say that with no provision in the Bankruptcy Act itself for the writ of *ne exeat,* such a writ may be issued under the provisions of Section 2, subd. 15 thereof, although the subject of detention is specifically and with great care and circumspection treated in the Bankruptcy Act in another section which hedges the power about with very important, not to say extraordinary, limitations. But the contention becomes unthinkable when we bear in mind that the issuance of writs of *ne exeat* is itself covered by another statute which also provides important limitations upon the power to issue that writ, and that the real contention here is, that an order of arrest may be made which is *neither* an order of arrest under the provisions of Section 9-b of the Bankruptcy Act, *nor* a

writ of *ne exeat* under Section 261 of the Judicial Code, and is issued without complying with *either* section, and, in fact, *in defiance of the provisions of both statutes.*

Before leaving the discussion of the three cases referred to, it should be noted that the *Cohen* case was decided on the authority of the *Lipke* case, and that the *Berkowitz* case was decided on the authority of the two first-mentioned cases and one other case that does not apply, practically without discussion.

In disposing of this point summarily, the District Court said in the *Berkowitz* case:

> "Upon the authority of Bankr. Act July 1, 1898, c. 541, sec. 2, subd. 15, 30 Stat. 546, sec. 716, Rev. St. U. S., *In re Lipke,* 3 Am. Bankr. Rep. 569, *In re Cohen,* 14 Am. Bankr. Rep. 355, and *In re Fleischer,* 18 Am. Bankr. Rep. 194, I have concluded that the order ought not to be vacated."
>
> *In re Berkowitz,* 173 Fed. 1012.

An examination of the *Fleischer* case referred to will reveal the fact that it is utterly irrelevant to the question involved either in our case or in the *Berkowitz* case, and the reference to that case is additional proof that the learned judge who decided the *Berkowitz* case did not give the subject the serious consideration which it deserves.

The *Fleischer* case was decided by Judge Hough of the Southern District of New York, and it merely held that an alleged bankrupt is subject to examination under Section 21a before adjudication. Section 1, subd. 4 of the Bankruptcy Act specifically says that the word

"bankrupt" includes an "alleged bankrupt". It is, therefore, clear that under the provisions of Section 21a, a bankrupt can be examined before adjudication and while his bankruptcy is merely "alleged". This was not disputed by the learned counsel who contested the right of the creditors to examine the alleged bankrupt. But the astute attorneys for the alleged bankrupt in that case raised the point that while the "alleged bankrupt" was a "bankrupt" within the provisions of the Bankruptcy Law, his estate was not "in process of administration" within the provisions of Section 21a. This contention was overruled by Judge Hough on the ground, which is indisputable, that from the moment a petition in bankruptcy is filed the estate of the alleged bankrupt passes to the court, which has a right to appoint a receiver who administers it on behalf of the court.

Yet this case was considered in the *Berkowitz* case of equal authority with the *Lipke* and *Cohen* cases on the question as to whether or not a writ of *ne exeat* may issue out of the Bankruptcy Court under the provisions of Section 2, subd. 15, in defiance of Section 9-b of the Bankruptcy Act and of Section 261 of the Judicial Code. And, as far as logic and legal principle is concerned, there can be no disputing the fact that the *Lipke* and *Cohen* cases are no better authority for the practice than is the *Fleischer* case.

Three other cases have been cited as authority for the proposition that Section 2, subd. 15, has conferred upon the Bankruptcy Courts the authority which is needed to sustain the order of arrest in question herein. These three cases are *In re Basch,* 97 Fed. Rep. 761; *In re Russell,* 101 Fed. Rep. 248; and, *In re Jersey Island Packing Co.,* 138 Fed. Rep. 625.

The last-mentioned case has not the slightest application to the case at bar. That was an order to restrain the treasurer of a bankrupt corporation from proceeding with the sale of the corporation's property under a trust deed, held by the Court to be a mortgage and claimed to have been issued in fraud of the corporation and its creditors. It should be remembered in this connection that express provision is made by the Bankruptcy Act for the enjoining of suits by third persons against the bankrupt. The proposed sale was clearly in the nature of a foreclosure action, even though the courts were not being resorted to; and it could certainly be restrained on that ground. Section 2, subd. 15, is referred to only incidentally, and its effect in cases where the subject is specifically covered by other provisions is not even touched upon. The real point decided in the *Basch* case can be gathered from the following paragraph of the opinion in that case:

> "The stay of suits against the bankrupt pending the bankrupt proceedings, is absolutely necessary to give effect to the bankruptcy act. Section 11 expressly extends the power to stay proceedings to suits even that were commenced before the petition was filed; and this in connection with section 2 (15), necessarily includes suits on provable debts commenced after the petition was filed and while the bankruptcy proceedings are pending, *as the greater power includes the less.*"
>
> *In re Basch*, 97 Fed. Rep. 761.

It is clear that that case was decided upon a theory wholly inapplicable to the case at bar. It goes, of course, without saying that the greater power includes the less.

But no one has ever heard of the proposition that a power expressly limited by statute is in fact unlimited.

The *Russell* case certainly does not lend itself for use as support for the extraordinary doctrine contended for on behalf of the petitioner herein. Although that case was decided in 1900, it seems to have arisen in 1889 and was, therefore, governed by the Bankruptcy Act of 1867. No reference is made in the opinion in that case to Section 2, subd. 15, of the present Bankruptcy Act, as it could not very well have been. Nor is there anything else in that case which in anyway lends itself to the doctrine contended for on behalf of the petitioner herein. The gist of the decision in that case is contained in the following passage, with which the opinion in that case concludes:

> "Authority to courts of bankruptcy to protect the property in their custody from such interference would seem to be specifically conferred by that provision of section 2 of the act permitting them to make such orders and issue such processes as may be necessary for enforcing their jurisdiction. The prohibition of section 720 of the Revised Statutes against enjoining the proceedings of a state court does not apply when any law relating to bankruptcy authorizes an injunction, nor does it when the proceedings sought to be enjoined have been commenced after the jurisdiction of the federal court has attached. *Fish* v. *Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4, 830; *French* v. *Hay*, 22 Wall. 250, 22 L. Ed. 857; *Dietzsch* v. *Hindekoper*, 103 U. S. 494, 26 L. Ed. 497.
>
> We conclude that the order under review, so far as it stayed the prosecution of the replevin

action, was properly made, and that, unless leave is obtained by the court of bankruptcy, the Machinists Supply Company must bring its action in that court. By clause 'c' of section 19 of the bankrupt act, it is entitled to a trial by jury. In *Re Bandonie,* we pointed out that, in the absence of provisions to the contrary in the act, *it is to be presumed that congress intended the ordinary procedure of courts of law or equity, according to the nature of the controversy, should be observed.* The order under review, so far as it undertook to deprive the Machinists' Supply Company of the right to be heard in a plenary suit by a reference of the controversy to a referee, was an erroneous exercise of power, and to that extent should be reversed with costs."

In re Russell, 101 Fed. Rep. 248.

It seems that it is the first part of this passage that is claimed as authority by the other side. What is there stated is clearly inapplicable to the case at bar. On the other hand, the last paragraph seems to us to be strongly opposed to the latitudinarian contentions advanced in support of the order of arrest issued herein, and to be, if anything, an authority on behalf of the views expressed in this brief.

Before closing this brief, we also beg to respectfully call attention to the language of Judge Choate in the case of *In re Hale,* 11 Fed. Cases 180. Although that case was decided under the Bankruptcy Act of 1867, the principles laid down by Judge Choate are as applicable to the present Bankruptcy Act as they were to the older one, since they merely summarize principles of law

which are basic in Anglo-Saxon jurisprudence. Judge Choate said:

> "The only power to arrest the bankrupt *expressly conferred* upon the Court by the statute is that given in Section 5024, which, in certain cases, authorizes the arrest of the alleged bankrupt *in an involuntary case* and the holding of him in custody or under bail until the decision of the Court * * * that is until the further order of the Court * * *. The power of arrest, therefore, *in any other case* must be implied from some other grant of power contained in the statute, or must be implied because it is essential to the proper exercise by the Court of the powers granted * * *. It can hardly be doubted that so great a power practically reviving imprisonment for debt and touching so seriously the liberty of a very large class of citizens, would, if intended to be given have been given expressly and not left to be inferred merely from the grant of other powers, and that if given, its exercise should have been *carefully limited* by the Act to prevent hardships and abuse. *The express grant of the power* in one case shows that the attention of the framers of the law was called to the subject and they are silent as to all other cases. This raises a *presumption* of some strength against the existence of *the power in other cases* * * * and the fact that no provision has been made * * * for a *warrant of arrest in any other cases than that expressly provided for in the Act* indicate the opinion of the Supreme Court that no such remedy is available."

In re Hale, 11 Fed. Cases 180 (No. 5911).

CONCLUSION.

The order of arrest made by the District Court of the Southern District of New York was clearly unwarranted and without jurisdiction: and the order of the Circuit Court of Appeals for the Second Circuit reversing that order which denied the motion to vacate, was, therefore, clearly right. The order appealed from should, therefore, be affirmed.

Respectfully submitted,

LOUIS JERSAWIT,
Attorney for Respondent.

APPENDIX.

The Bankruptcy Act of 1898, as amended (11 U. S. C. A.), provides in part as follows:

"Sec. 1 (4) * * * 'bankrupt' shall include a person against whom an involuntary petition * * * has been filed or who has filed a voluntary petition, or who has been adjudged a bankrupt.

Section 2. That the Courts of Bankruptcy as hereinbefore defined, viz., the District Courts of the United States in the several States, the Supreme Court of the District of Columbia, the District Courts of the several Territories, and the United States Courts in the Indian Territory and the District of Alaska, are hereby made Courts of Bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held to * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

Section 7, Subdivision a. The bankrupt shall * * * (9) when present at the first meeting of his creditors and at such other times as the court shall order, submit to an examination concerning the

conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate. * * *

Section 9, Subdivision b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

Section 21, Subdivision a. A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. * * *"

Section 261 of the Judicial Code (28 U. S. C. A. 376) provides as follows:

> "*Writs of ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court; and by any District Judge, in cases where they might be granted by the District Court of which he is a Judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the Court or Judge granting the same that the *defendant* designs quickly to depart from the United States." (Italics ours.)

SUPREME COURT OF THE UNITED STATES.

No. 429.—October Term, 1931.

D. Ginsberg & Sons, Inc., Petitioner,
vs.
Joseph Popkin.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 14, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

The district court in the eastern district of New York adjudged the Foster Construction Corporation a bankrupt and in June, 1930, a trustee was appointed. Respondent was president and petitioner was a creditor of the corporation. December 4, 1930, petitioner presented to one of the judges in the southern district of New York a petition, the brief substance of which follows:

In 1929, about the time the petition in bankruptcy was filed, respondent withdrew, and has failed to account for, a large amount of cash belonging to the corporation. He fled to Canada in order to avoid examination and did not return until January, 1930. About that time the court in the eastern district issued an order of *ne exeat* against him but he fled again and later returned to the borough of Manhattan where he was then concealing himself with the intention of immediately leaving the United States to avoid examination. The petition stated that respondent's testimony would be in aid of creditors and that, had he been requested so to do, the trustee would have refused to apply for his arrest and that therefore the petitioner made the application for an ancillary order of examination and arrest in aid of itself and other creditors. It was shown that a judge in the eastern district authorized petitioner to apply for this order in the southern district.

On these representations the judge made an order of examination and arrest. And on the same day he signed another order, under the caption "Writ Ne Exeat", commanding the marshal to apprehend respondent, take him into custody and bring him before the judge for examination "or, at his option, cause him to

give sufficient bail or security in the sum of $10,000 . . . that he the said Joseph Popkin will not depart from or go . . . beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, in default of which he is to be lodged in New York County Jail . . . ". In obedience to that command the marshal arrested respondent. He gave the prescribed bail and the clerk released him from custody. Then respondent applied to a judge in the southern district to have the order vacated on the ground that it was made without jurisdiction. The motion was denied. 47 F. (2d) 276. The Circuit Court of Appeals reversed. 50 F. (2d) 693.

The petitioner contends that clause (15) of § 2 empowers district judges in bankruptcy cases upon the application of a creditor to issue orders directing the arrest of officers of bankrupt corporations.

The words of § 2 relied on are: "The courts of bankruptcy . . . are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act".

Clause (15) is to be construed having regard to the other parts of § 2, to the provisions of the Act in respect of examinations concerning the business and property of bankrupts, and to § 261 of the Judicial Code relating to writs of *ne exeat*.

Section 2 creates courts of bankruptcy and in general terms, by twenty separately numbered clauses, confers upon them authority in respect of at least as many matters relating to bankruptcies. By clause (13) bankruptcy courts are empowered by means of fine or imprisonment to enforce obedience by bankrupts and others to all lawful orders and by clause (16) to punish persons for contempts committed before referees. Section 7a (9) makes it the duty of the bankrupt, when present at the first meeting of creditors and at such other times as the court shall order, to submit to examination concerning his business, acts and property. Section 21a empowers the court upon the application of a creditor to require any designated person including the bankrupt to appear for

similar examination. Section 9a exempts the bankrupt from arrest upon civil process issued from a court of bankruptcy except for contempt or disobedience of its lawful orders. And § 9b specifically governs arrests and detention of bankrupts about to leave the district in order to avoid examination. It is as follows:

"The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto."

Section 261 of the Judicial Code provides that writs of *ne exeat* may be granted by any district judge in cases where they might be granted by the district court of which he is a judge, and declares: "But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States".

In view of the general exemption of bankrupts from arrest under § 9a and the carefully guarded exception made by § 9b as to those about to leave the district to avoid examination, there is no support for petitioner's contention that the general language of § 2 (15) is a limitation upon § 9 (b) or grants additional authority in respect of arrests of bankrupts. General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase,* 135 U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner* v. *United States,* 195 U. S. 100, 125. *In re Hassenbusch,* 108 Fed. 38. *United States* v. *Peters,* 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Market*

Company v. *Hoffman,* 101 U. S. 112, 115. *Ex parte Public Bank,* 278 U. S. 101, 104.

Assuming that under § 2 (15) bankruptcy courts are empowered to allow writs of *ne exeat,* that granted in this case was without warrant for conditions made essential by the common law and as well by the Judicial Code were lacking.

Speaking for the Supreme Court of Wisconsin in *Davidor* v. *Rosenberg,* 130 Wis. 22, Mr. Justice Winslow described the writ of *ne exeat* as follows (p. 24): "At common law it was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual. *Dean* v. *Smith,* 23 Wis. 483. *Rhodes* v. *Cousins,* 6 Rand. 188, 191, 18 Am. Dec. 715; *Gibert* v. *Colt,* 1 Hopk. Ch. 496, 14 Am. Dec. 557, and note".

The writ is a restraint upon the common right of movement from place to place within the United States and upon emigration. It has been abolished in some States and its use is largely regulated and restricted by statute in others.* And § 261 of the Judicial Code strictly governs the granting of the writ in federal courts.

Section 9 (b) provides a substitute for and so excludes the use of the writ against bankrupts. As respondent is not a bankrupt, that subdivision does not authorize his arrest or afford him protection. There is no reason for stricter measures to compel others to submit to examination. General authority to compel attendance and the giving of testimony is conferred by § 21a and § 2 (13) and (16). And, in the absence of language specifically disclosing that purpose, Congress will not be deemed to have intended to subject officers of bankrupt corporations or other witnesses to arrests and detentions, by writ of *ne exeat* or otherwise, against which § 9a and b protects bankrupt persons. We conclude that the court had no authority under § 2 (15) or otherwise to make the order of arrest and *ne exeat* under consideration.

Judgment affirmed.

*See authorities cited in note, 14 Am. Dec. 560.